No. 99-1908-CFX Title: James Alexander, Director, Alabama Department of Public Safety, et al., Petitioners
v.
Martha Sandoval, Individually and on Behalf of All Others Similarly Situated

Docketed:
May 31, 2000

Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jan 16 2000	ARGUED.
	May 30 2000	Petition for writ of certiorari filed. (Response due July 31, 2000)
	Jun 8 2000	Order extending time to file response to petition until July 31, 2000.
	Jun 13 2000	Waiver of right of respondent United States to respond filed.
	Jul 12 2000	DISTRIBUTED for Conference of September 25, 2000
	Jul 14 2000	Brief amici curiae of English Language Advocates, et al. filed.
	Jul 26 2000	Brief amicus curiae of Pacific Legal Foundation filed.
	Jul 31 2000	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Jul 31 2000	Brief amicus curiae of U.S. English filed.
	Jul 31 2000	Brief of respondent Martha Sandoval in opposition filed.
	Aug 9 2000	Reply brief of petitioners James Alexander, et al. filed.
	Sep 18 2000	Supplemental brief of petitioners filed.
	Sep 26 2000	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT January 16, 2001. **********
	Nov 9 2000	Brief amici curiae of Pro English, et al. filed.
	Nov 13 2000	Joint appendix filed.
	Nov 13 2000	Brief of petitioners James Alexander, et al. filed.
	Nov 13 2000	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Nov 13 2000	Brief amicus curiae of U.S. English filed.
	Nov 13 2000	Brief amici curiae of Pacific Legal Foundation, et al. filed.
	Nov 13 2000	Brief amicus curiae of National Collegiate Athletic Association filed.
	Nov 13 2000	Brief amicus curiae of National Association of Manufacturers filed.
	Nov 13 2000	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed.
	Nov 13 2000	Brief amicus curiae of Beauty Enterprises, Inc. filed.
	Nov 13 2000	Brief amici curiae of Robert C. Jubelirer and Matthew Ryan

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No. 99-1908-CFX

Entry	Date	Proceedings and Orders
		filed.
	Nov 13 2000	Brief amicus curiae of Central Puget Sound Regional Transit Authority filed.
	Nov 29 2000	Motion of the Solicitor General for divided argument filed.
	Dec 5 2000	Record filed.
	Dec 7 2000	Record filed.
	Dec 8 2000	Motion of the Solicitor General for divided argument DISTRIBUTED.
	Dec 8 2000	CIRCULATED.
	Dec 11 2000	Motion of the Solicitor General for divided argument GRANTED.
	Dec 13 2000	Brief of respondent United States filed.
	Dec 13 2000	Brief of respondents Martha Sandoval, et al. filed.
	Dec 13 2000	LODGING consisting of twenty copies of State Assurances to DOT, submitted by the Solicitor General and disstributed.
	Dec 13 2000	Brief amici curiae of Center on Race, Poverty and Environment, et al. filed.
	Dec 13 2000	Brief amici curiae of NAACP Legal Defense & Educational Fund, et al. filed.
	Dec 13 2000	Brief amici curiae of National Women's Law Center, et al. filed.
	Dec 29 2000	Reply brief of petitioners James Alexander, et al. filed.
	Jan 16 2001	ARGUED.

(1) Supreme Court, U.S.
FILED

99 1908 MAY 30 2000

No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress intended to create a private cause of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

PARTIES TO THE PROCEEDINGS

James Alexander is the present Director of the Alabama Department of Public Safety. When this case was filed in the District Court, the Director of the Alabama Department of Public Safety was L. N. Hagan. After the case was argued in the United States Court of Appeals for the Eleventh Circuit, Alexander was appointed Director. This appointment was noted in footnote 2 of Petitioners' Petition for Rehearing and Application for Rehearing En Banc, filed on December 21, 1999, in the Eleventh Circuit, and Alexander is now substituted for Hagan.

The Alabama Department of Public Safety is a department of the State of Alabama. To the extent applicable, it is entitled to the benefit of the State's Eleventh Amendment immunity. The Department of Public Safety receives grants from several federal agencies each year. None of those grants relate to the testing of applicants for driver's licenses.

Martha Sandoval is a private individual. She is also the class representative of a plaintiff class composed of:

> all legal residents of the State of Alabama who are otherwise qualified to obtain a Class D private vehicle driver's license but cannot do so because they are not sufficiently fluent in English.

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PETITION FOR WRIT OF CERTIORARI

The Alabama Department of Public Safety and its Director, by and through its counsel, the Attorney General of the State of Alabama, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit is reported as *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999). It is reprinted in the Appendix to the Petition for Writ of Certiorari on pages 1a-57a. The opinion of the U.S. District Court for the Middle District of Alabama, Northern Division, is reported as *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998). It is reprinted in the Appendix to the Petition for Writ of Certiorari on pages 58a-254a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit was entered on February 29, 2000. *See* App. at 255a-256a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. The relevant United States statutory provisions are Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d and 2000d-1 (1994). The provisions are reprinted in Appendix to the Petition at pages 257a-258a.

2. The relevant regulatory provisions are 28 C.F.R. §§ 42.104 (General and specific prohibitions), 42.107 (Complaint investigations), 42.108 (Agency procedure for effecting compliance), 50.3 (Guidelines for enforcement of Title VI), and 49 C.F.R. § 21.5 (General and specific prohibitions), 21.11 (Complaint investigations), and 21.13 (Agency procedure for effecting compliance). These provisions are reprinted in the Appendix to the Petition at pages 259a-285a.

STATEMENT OF THE CASE

Background

In this case, the Alabama Department of Public Safety and its Director were sued by private individuals who sought to compel it to conform to their interpretation of one of the provisions common to federal grants that the Department receives, the requirement that grantees adhere to, *inter alia*, regulations promulgated under Section 602 of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d-1. The Eleventh Circuit held that such a private lawsuit could proceed, reasoning that private individuals are entitled to sue the grantee to enforce those disparate effect regulations. Here, the plaintiffs

contend that the Department's practice[1] of testing applicants for driver's licenses only in the English language violated those regulations because it had the effect of discriminating on the basis of national origin. By recognizing an implied private action to enforce the regulations, the Eleventh Circuit allowed the plaintiffs to require the Department to change its policy by linking language to national origin.

The question whether Congress intended to create an implied private right of action to enforce agency regulations promulgated under Section 602 of the Civil Rights Act of 1964 is familiar to this Court, but has not been decided by it. In 1998, this Court granted certiorari in a case that presented this issue, but that case became moot before this Court could decide it and it was dismissed. *See Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974 (1998). Private lawsuits seeking to enforce disparate effect regulations continue to be filed, showing that there is a need to resolve the issue.

Proceedings Before the District Court

Plaintiff Martha Sandoval[2] brought suit against the Alabama Department of Public Safety and its then

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[1] This practice was adopted after Alabama's voters overwhelmingly approved Amendment 509 to the Alabama Constitution. *See* App. at 4a; 166a-167a.

[2] In her complaint, Sandoval sought certification of a plaintiff class and was later certified as the representative of a class composed of "all legal residents of the State of Alabama who are otherwise qualified to obtain a Class D private vehicle driver's license but cannot do so because they are not sufficiently fluent in English."

Director, L. N. Hagan (collectively, the "Department"), alleging that the Department's practice of giving the written examination for standard driver's licenses in the English language only violated her right to be free from discrimination on the basis of national origin. She asserted claims under: 42 U.S.C. § 1981; 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, and its implementing regulations. Sandoval sought a declaratory judgment declaring the Department's practice to be unlawful and unconstitutional and an injunction prohibiting the Department from continuing to test only in English.

The District Court held that Sandoval had an implied private right of action to enforce disparate effect regulations promulgated by the United States Department of Justice and the United States Department of Transportation. App. at 117a. It reserved ruling on Sandoval's Equal Protection claim brought through § 1983 and denied her § 1981 claim on the ground that it was duplicative of the § 1983 claim. The District Court then held that the Department's practice of testing in the English language only had a disparate effect on the basis of national origin. *See* App. at 64a n.4 and 247a (noting that it had granted the Department's motion for judgment as a matter of law on Sandoval's claims of intentional discrimination). It declared that the practice violates Title VI of the Civil Rights Act of 1964, enjoined the Department from continuing it, and ordered the Department, in conjunction with the plaintiffs, to fashion "proposed policies and practices for the accommodation of Alabama's non-

English speaking residents who seek Alabama driver's licenses." App. at 252a-254a.

The Eleventh Circuit affirmed the District Court's ruling. In particular, although it noted that this Court "has yet to squarely answer the question . . . ," App. at 42a, it held that "Title VI creates a private implied cause of action to enforce the disparate impact regulations promulgated under Section 602." *Id.*

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law that this Court has not yet resolved: whether Congress intended to create a right of action against a state agency that would permit private citizens to enforce the terms of Title VI regulations that are incorporated in federal grants. In 1998, this Court granted a writ of certiorari in a case that raised that precise issue, but, before this Court could resolve the issue, the case became moot and was dismissed. This case presents this Court with another opportunity to answer this question.

It is important that this Court take advantage of this opportunity for two reasons. First, public agencies throughout the country are federal grantees. Those grantees have an interest in knowing the scope of the obligations they assume. That interest is frustrated when private litigants direct disparate effect lawsuits at policies and practices that are not intentionally discriminatory and are unrelated to the purpose of the grant. Moreover, such private actions bypass grantor agency review and

enforcement procedures which reflect the will of Congress.

It is also important because the theory that private rights of action exist under Title VI regulations continues to be applied. In addition to this case, a number of recent cases against state agencies have involved disparate effect attacks on public policy decisions. In *Bryant v. New Jersey Department of Transportation*, 987 F. Supp. 343 (D.N.J. 1998), *vacated in part*, 998 F. Supp. 438 (D.N.J. 1998), the plaintiffs challenged the siting of a state highway project. *Chester Residents* involved the siting of a waste-water treatment facility. Another example is the challenge to California's Proposition 227, an initiative that replaced bilingual education programs with programs designed to teach students with limited English proficiency in the English language. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998).

These cases show that the concern that this Court expressed some 34 years ago in *Washington v. Davis*, 426 U.S. 229, 248 (1976), that disparate impact claims would threaten "a whole range of tax, welfare, public service, regulatory, and licensing statutes," is not misplaced. *See also Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O'Connor, J., with Scalia, J., concurring in the judgment) (quoting *Washington v. Davis*). This case presents this Court with a clear opportunity to resolve this question.

This Court should review the important question, which it has never squarely addressed, whether a private right of action exists to support Title VI regulations for two principal reasons. First, this Court granted certiorari on this issue in *Chester Residents*, but never reached the

issue because the underlying judgment was vacated as moot. Thus, this important question remains undecided. Second, the Eleventh Circuit, joined by the other Courts of Appeals, decided the issue incorrectly. Neither the statutory language nor this Court's decisions support the implication of a private right of action.

I. This Court Granted Certiorari On the Same Issue in *Chester Residents*.

In *Chester Residents*, a non-profit corporation and various individuals sued the Pennsylvania Department of Environmental Protection ("PADEP") and Pennsylvania officials under Title VI. PADEP had responsibility for issuing permits to operate waste-water treatment facilities, and the Chester Residents plaintiffs contended that the proposed siting of one such facility violated Title VI and discriminatory effect regulations promulgated by the United States Environmental Protection Administration. In part, those regulations prohibit recipients of federal funding from using "criteria or methods . . . which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." *See* 40 C.F.R. § 7.35(b) (1997).[3] The District Court dismissed the complaint with prejudice.

On appeal, the only issue before the Third Circuit was whether the Chester Residents plaintiffs had the

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[3] The Department of Justice and Department of Transportation regulations at issue in this case include very similar provisions. *See* 28 C.F.R. § 42.104(b)(2), App. at 259a-260a, and 49 C.F.R. § 21.5(b)(2), App. at 277a-278a, respectively.

right to sue to enforce those EPA disparate effect regulations. The Third Circuit explained, "This appeal presents the purely legal question of whether a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to Section 602 of Title VI of the Civil Rights Act of 1964." *Id.*, 132 F.2d at 927. The Third Circuit noted that the "applicable precedent" of this Court was "not dispositive." *Id.* at 932. Even so, it concluded that a private right of action could be implied in favor of the Chester Residents plaintiffs and reversed the district court's ruling.

PADEP and the Pennsylvania officials submitted a single-issue petition for writ of certiorari that this Court granted on June 8, 1998. *See Chester Residents*, 524 U.S. 915 (1998). PADEP's petition presented the following question:

> Did Congress intend to create a private cause of action in federal court that bypasses a federal agency's review and enforcement process under Section 602 of the Civil Rights Act of 1964, simply by alleging a discriminatory effect in the administration of programs and activities of a federally-funded State or local agency?

After this Court granted the petition, however, the Chester Residents plaintiffs suggested mootness because the company that planned to operate the facility had changed its plans, and PADEP had revoked its permit. This Court agreed with the Chester Residents plaintiffs' suggestion of mootness and dismissed the case, citing *United States v. Munsingwear*, 340 U.S. 36 (1950). *See Chester Residents*, 524 U.S. 974 (1998).

Notwithstanding that such *Munsingwear* dismissals are intended to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences," *see Munsingwear*, 340 U.S. at 41, the Third Circuit tracked its reasoning in *Chester Residents* in another case. *See Powell v. Ridge*, 187 F.3d 387 (3d Cir.). *cert. denied*, 120 S. Ct. 579 (1999). Likewise, the Eleventh Circuit panel cited the vacated Third Circuit decision in support of its reasoning. *See* App. at 41a-42a; *see also Maryland State Conference of NAACP Branches v. Maryland Department of State Police*, 72 F. Supp. 2d 560, 567 (D. Md. 1999) (noting "persuasive reasoning" of Third Circuit's decision).

II. The Court of Appeals Erred in Concluding That Private Citizens Have a Private Right of Action That Allows Them to Sue Recipients of Federal Funds to Enforce Agency Regulations Promulgated Under Section 602 of the Civil Rights Act of 1964 and Bypass Agency Review and Enforcement Procedures.

1. Congress Did Not Intend to Create a Private Right of Action to Enforce Regulations Promulgated Under Section 602.

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court cited four factors relevant in determining whether an implied private right of action exists: (1) whether the statute creates a federal right in favor of the plaintiff; (2) whether there is any legislative intent to create or deny a remedy; (3) whether it is consistent with the purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally relegated to state law. Underlying all of these considerations is the

fundamental question of "whether Congress intended to create a private right of action." *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 13 (1981). *See also, Suter v. Artist M.*, 503 U.S. 347, 364 (1992); *California v. Sierra Club*, 451 U.S. 287, 293 (1981). Thus, "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy does not exist." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981).

The conclusion that Congress did not intend to create a private right of action to enforce Section 602 regulations flows from both the statutory language and the statutory structure. Separation of powers concerns and the need to take the express terms of congressional enactments seriously guide the inquiry into congressional intent. Thus, in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 284 (1998), this Court noted that the inquiry "inherently entails a degree of speculation," and, accordingly, it endeavored to "ensure that we do not fashion the parameters of an implied private right of action in a manner at odds with the statutory structure and purpose." The structure and purpose of Title VI demonstrate that the Courts of Appeals have erred in implying the existence of a cause of action under the disparate impact regulations.

This Court has consistently held that Title VI prohibits only intentional discrimination by recipients of federal financial assistance. *See Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Regents of University of Calif. v. Bakke*, 438 U.S. 265, 287, 328-40 (1978). When courts hold that there is an implied private right of action to enforce the ban on

intentional discrimination, *see Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) ("[W]e have no doubt that Congress . . . understood Title VI as authorizing an implied private cause of action for the prohibited discrimination"), they vindicate the perceived intent of Congress. These holdings do not answer the question presented, which must be answered by looking to Section 602.

The plain language of Section 602 contains no basis for inferring a private right of action. If such a right exists, it must be inferred because Section 602 does not expressly create one. Rather, Section 602 expressly empowers federal agencies to enforce compliance with their rules, regulations, and codes of general applicability:

> (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law. . . .

App. at 258a. Such agency action is subject to additional limitations. First, "the agency or department concerned" must attempt to obtain voluntary compliance. Second, before terminating or otherwise cutting off funding, "the head of the Federal department or agency" must give

notice to Congress by filing "a full written report." Furthermore, "[n]o such action shall become effective until thirty days have elapsed after the filing of such report." *Id.*

The express creation of agency remedies and the absence of any mention of a private remedy counsel strongly against finding an implied private right of action. *Cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("[W]hen Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.") In *Gebser*, this Court observed that the presence of an express administrative remedy that includes notice to Title IX grantees makes it "unsound" to imply a judicial remedy on absence of actual notice. *Id.*, 524 U.S. at 289. The contention that private lawsuits serve as notice overlooks the checks on agency actions. When federal agencies are required to provide notice to Congress and wait for 30 days before acting, those agencies must make certain that any conditions they wish to impose on a recipient of federal funds conform to Congress's understanding of the law. In contrast, private plaintiffs are subject to no such check but are free to attempt to remake State policies at will. The availability of a private remedy also makes the expressly created agency remedies unnecessary and the quoted language of Section 602 redundant.

In making agency remedies irrelevant, the proposed private right of action operates contrary to the language of Section 602 and to this Court's understanding expressed in *Alexander v. Choate*, 469 U.S. 287 (1985). Pursuant to Section 602, the federal agencies that have promulgated regulations that include complaint and

investigation procedures and procedures for effecting compliance. *See, e.g.*, 28 C.F.R. §§ 42.107, 42.108, App. at 263a-265a, and 49 C.F.R. §§ 21.11, 21.13, App. at 282a-285a. The procedures for effecting compliance conform to the requirements and incorporate the safeguards Congress specified in Section 602. Bypassing those procedures makes them redundant. In addition, bypassing the agencies deprives grantees and the courts of their expertise. In *Alexander*, this Court noted that Title VI "delegated to the agencies in the first instance the determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of federal grantees that had produced those impacts." *Id.* at 293-94. Those prudential judgments are shifted to the courts by the implication of a private right of action.

Implying a private right of action for regulation-based disparate impact claims is also inconsistent with the contractual nature of Title VI. This Court has explained that:

> The legitimacy of Congress's power to legislate under the spending clause . . . rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if the Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981) (internal citations and footnote omitted).[4] More recently, in *Gebser*, this Court observed that the contractual theory of grants has "implications for our construction of the scope of available remedies." 524 U.S. at 287. Among other things, funds are given to recipients for specific purposes. The obligations that private lawsuits impose divert funds from those specified purposes, and the related costs may exceed the funding provided. *See Gebser*, 524 U.S. at 290.

In sum, Congress most certainly has not spoken "with a clear voice" regarding disparate-effect claims under Title VI, *compare* 42 U.S.C. § 2000e-2(k) (Establishing the burden of proof in disparate impact cases under Title VII), and, more specifically, private rights of action to enforce such claims. If the test is what Congress envisioned the States' liability to private parties would be, once again, the answer is clear: There is no basis upon which to conclude that Congress "envisioned" States being subjected to private actions asserting that State programs have a disparate effect because those programs are recipients of federal funds.

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[4] As set forth in greater detail below, Congress has expressly mandated accommodations to individuals who do not speak English fluently in only two contexts: the educational through the Bilingual Education Act, 20 U.S.C. §§ 7402(b), 7403, 7421, 7422-25; and the voting through an amendment to the Voting Rights Act, *see* 42 U.S.C. § 1973aa-1a(b)(2).

2. This Court Has Not Found That There is an Implied Private Right of Action Under the Disparate-Effect Regulations.

This Court has neither expressly nor impliedly held that there is an implied private right of action under the disparate effect regulations. In particular, neither *Guardians Assn. v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983), nor *Alexander v. Choate*, 469 U.S. 287 (1985), support the implication of a private right of action to enforce the regulations. In *Guardians*, this Court affirmed the denial of compensatory relief to plaintiffs in a Title VI lawsuit, reaching two conclusions as it did so. First, seven members of the Court agreed that proof of discriminatory intent is required to establish a violation of Title VI. 463 U.S. at 607 n.1. (Opinion of Powell, J.). Second, five members of the Court joined "to form a majority for upholding the *validity* of the regulations incorporating a disparate-impact standard." *Id.* at 607 n.27 (Opinion of White, J.) (emphasis added); *see also id.* at 584 n.2. In *Alexander*, the Court confirmed this reading of *Guardians*. 469 U.S. at 292-93. Rather than finding that a private right of action exists, the Court found that "Title VI had delegated to the *agencies* in the first instance the determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of federal grantees that had produced those impacts." *Id.* at 293-94 (emphasis added).

More recently, the Court rejected an attempt by private petitioners to assert a claim regarding affirmative action required by Title VI regulations. *United States v. Fordice*, 505 U.S. 717 (1992). The Court stated:

> Private petitioners reiterate in this court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to "overcome the effects of prior discrimination." 34 C.F.R. § 100.3(b)(6)(i) (1991). Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. [Citing *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and *Guardians*] We thus treat these issues as they are implicated under the Constitution.

Id., 505 U.S. at 732 n.7.[5]

Guardians, *Alexander*, and *Fordice* show that this Court has not resolved this issue in favor of Respondents. Indeed, if this issue had been resolved in favor of Respondents by this Court's previous decisions, there would have been no basis for granting certiorari in *Chester Residents*.

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[5] If the underlying issue in this case were resolved as it is implicated under the Constitution, the Department would have prevailed because the courts have uniformly held that a public agency's practice of communicating only in English does not constitute intentional discrimination on the basis of national origin. *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973). Therefore, we dispute the Eleventh Circuit's finding that Title VI "flatly prohibits . . . English language policies that cause disparate impact on the basis of national origin," 197 F.3d at 495, particularly here, where Alabama's English language proficiency policy for drivers (a) is based on an Alabama constitutional provision that declares English to be the official language of Alabama and (b) serves important state interests of public health and safety.

Read in this light, and in the light of subsequent developments, *Lau v. Nichols*, 414 U.S. 563 (1974), cannot provide the basis for inferring the existence of an implied private right of action under Title VI regulations. In *Lau*, the Court held that a school district violated agency regulations promulgated pursuant to Section 602 by failing to give equal educational opportunities to students of Chinese ancestry who did not speak English. Any conclusion regarding a private right of action under agency regulations is plainly tacit. Significantly, *Cort v. Ash*, which established the four-part test for implying private rights of action, was decided after *Lau*.

Lau's weakness is made even more apparent by subsequent events. First, in *Bakke*, four justices expressed doubts regarding the validity of *Lau*'s premise: Justices Brennan, White, Marshall, and Blackmun agreed that "[n]owhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution." *Bakke*, 438 U.S. at 332. Second, four justices who concurred in *Guardians* noted that, to the extent that liability under Title VI for conduct having only a discriminatory effect had been tacitly approved in *Lau*, that holding was wrong and was impliedly overruled by *Bakke*. *See Guardians*, 463 U.S. at 611 n.4 (Powell, J., concurring in judgment and joined by Burger, C. J., and Rehnquist, J.) and 463 U.S. at 615 (O'Connor, J., concurring in judgment). Moreover, Congress codified *Lau* in the educational context only in the Bilingual Education Act, and thereby limited its scope. Thereafter, private persons unhappy with the refusal of a

public agency to communicate in foreign languages proceeded under the Equal Protection Clause, not Title VI. *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983); *Vialez v. New York City Housing Authority*, 783 F. Supp. 109 (S.D.N.Y. 1991).

3. The Implication of a Private Right of Action Affects Grantees Adversely.

This case illustrates the problems that can flow from the recognition of an implied private right of action to enforce Section 602 regulations. The Department is and has been the recipient of federal grants from the Department of Justice and the Department of Transportation. Those grants fund activities like trooper overtime for speed limit enforcement, training for hostage rescue and negotiator teams, marijuana eradication, and linkup with a nationwide registry of problem drivers. None of those grants expressly requires the Department to refrain from testing applicants for driver's licenses only in the English language. Not since 1974, however, when this Court decided *Lau v. Nichols*, has a state program that receives federal funds been directed to accommodate people who do not speak English fluently so as not to have the effect of discriminating on the basis of national origin. That result has been accomplished in this case by private plaintiffs.

It is a result that Congress cannot be said to have mandated. Congress has expressly mandated general accommodations to individuals who do not speak English fluently in two contexts. First, Congress essentially codified *Lau* in limited form in the Bilingual Education Act.

See 20 U.S.C. §§ 7402(b), 7403, 7421, 7422-25. Second, in an amendment to the Voting Rights Act, Congress mandated bilingual ballots and other voting materials where a limited-English-proficient language minority exceeds 5% of a State's voting age population. *See* 42 U.S.C. § 1973aa-1a(b)(2).

Moreover, the Department, a State agency, is being directed to do something that federal agencies do not do in this context. In *Nazarova v. INS*, 171 F.3d, 478 (7th Cir. 1999), for example, the Seventh Circuit held that the INS was not required to print its forms and notices in Russian. It characterized the suggestion that a federal agency print forms in Russian as "a broad and troublesome proposition." *Id.* at 483. In *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994), the Second Circuit rejected the suggestion that notices of seizure had to be printed in French, calling "the requirement that the government ascertain, and provide notice in, the 'preferred' language of prison inmates or detainees . . . a patently unreasonable burden. . . . " *Id.* at 446. In addition, a multitude of federal regulatory provisions requires a degree of English proficiency.

In sum, this Court has not held that a private right of action to enforce Section 602 regulations exists. It granted certiorari in *Chester Residents* to resolve this important question of federal law. The question remains unresolved, and this petition presents it anew. This Court should grant the writ of certiorari.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant their petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6598

D.C. Docket No. CV-96-D-1875-N

MARTHA SANDOVAL,
individually
and on behalf of all
others similarly situated,

Plaintiffs-Appellees,

versus

L.N. HAGAN, in his official
capacity as Director of the Alabama
Department of Public Safety,
and ALABAMA DEPARTMENT OF
PUBLIC SAFETY,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

(November 30, 1999)

Before HULL and MARCUS, Circuit Judges, and RONEY, Senior Circuit Judge.

MARCUS, Circuit Judge:

Martha Sandoval, on her own behalf and as the representative of others similarly situated ("Appellees"), filed this lawsuit against the Alabama Department of

Public Safety and its director L.N. Hagan, in his official capacity ("Appellants"), challenging the lawfulness of the Department of Public Safety's ("Department") official policy of administering its driver's license examination only in the English language. Appellees specifically alleged that the policy constituted discrimination on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-4 and its implementing regulations, as well as the Equal Protection Clause of the Fourteenth Amendment as secured by 42 U.S.C. § 1981 and 42 U.S.C. § 1983. After a bench trial, the district court entered a permanent injunction prohibiting the Department's enforcement of the English-only policy pursuant to Section 602 of Title VI, and ordered the Department to make reasonable accommodations for non-English speakers who applied for a driver's license.

Appellants broadly challenge the district court's order on three grounds: first, the lawsuit is barred by the Eleventh Amendment; second, Section 602 of Title VI does not contain an implied private cause of action; and finally, an English-language policy cannot constitute unlawful national origin discrimination as a matter of law. After thoroughly reviewing the record and parties' briefs, we affirm the district court's judgment.

I.

The factual and procedural history surrounding this case are straightforward, uncontroverted, and laid out fully by the district court. Alabama, like almost every other state, historically has administered the written part of its Class D driver's license exam in a variety of foreign

languages. From the 1970s to 1991, the Department administered the exam in at least fourteen foreign languages, including Spanish, Korean, Farsi, Cambodian, German, Laotian, Greek, Arabic, French, Japanese, Polish, Thai, and Vietnamese.

However, on July 13, 1990, an English-only Amendment to the Alabama Constitution was ratified. Amendment 509 states:

> English is the official language of the state of Alabama. The legislature shall enforce this amendment by appropriate legislation. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama.
>
> Any person who is a resident of or doing business in the state of Alabama shall have standing to sue the state of Alabama to enforce this amendment, and the courts of record of the state of Alabama shall have jurisdiction to hear cases brought to enforce this provision. The legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this amendment.

Approximately one year later, the Department adopted an English-*only* policy, requiring all portions of the driver's license examination process, including the written exam, to be administered in English only. Interpreters, translation dictionaries, and other interpretive aids were officially forbidden. However, the Department's official

policy still continues to provide special accommodations for illiterate, hearing-impaired, deaf, and disabled applicants. Notably, the Department also permits non-English-speaking drivers from other states and foreign countries to exchange a valid out-of-state license for an Alabama license without taking the written exam.

Eight months after the implementation of the Department's English-only policy, the Department requested an opinion from Alabama's Attorney General regarding "whether Amendment No. 509 . . . prohibits the Department from giving license tests in any language other than English." The opinion concluded that Amendment 509 required all applicants for driver's licenses to take the examination in English. Although the opinion candidly acknowledged that the English-only policy "might be a violation of Title VI of the Civil Rights Act of 1964, or the Equal Protection Clause of the Fourteenth Amendment, consideration of safety and integrity of the licensing process would, [in the words of the opinion], support a requirement that driver licensing examinations be given in English."

On December 31, 1996, Martha Sandoval, on her own behalf and as the representative of others similarly situated, filed suit in the United States District Court for the Middle District of Alabama against the Alabama Department of Public Safety, and its Director L.N. Hagan.[1] She sought a judgment declaring the Appellants' practice

[1] Sandoval's original complaint omitted Director Hagan from the Title VI claim but the district court granted Sandoval's Motion for Leave to Amend the Complaint which added Hagan as a named defendant.

unlawful and unconstitutional, and permanently enjoining Appellants from continuing to test only in English.[2]

On September 3, 1997, the magistrate judge recommended that the district court grant Sandoval's motion to certify a plaintiff class. The Department did not object, and on October 17, 1997, the district court certified the class, naming Sandoval as the representative of the class of "all legal residents of the State of Alabama who are otherwise qualified to obtain a Class D private vehicle driver's license but cannot do so because they are not sufficiently fluent in English." Soon thereafter, Hagan and the Department moved for summary judgment, which the district court denied, concluding that "the issues raised are more amenable to disposition after a full legal and factual exploration at trial."

This case was tried to the court on February 17 and 18, 1998. At its close, the district court granted, with the full agreement of Appellees, Appellants' motion for judgment as a matter of law on Appellees' claim that the policy was adopted as a pretext for discrimination and that the Department intentionally discriminated on the basis of national origin. In addition, the district court

[2] We construe Appellee's suit to be based on 49 C.F.R. § 21.5(b)(2) (Department of Transportation) and 28 C.F.R. § 42.104(b)(2) (Department of Justice) which require recipients of federal funds to not "directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting [individuals] to discrimination on the basis of their race, color, or national origin." Appellants concede that these agency implementing regulations are valid exercises of agency authority under Section 2000d-1.

granted Appellants' motion for summary judgment on Appellees' Section 1981 claims, finding that those claims were duplications of their Section 1983 claims.

Thereafter, the district court entered a memorandum opinion and order, ruling in Appellees' favor on their claim arising under Title VI's disparate impact regulations. The court enjoined Appellants from enforcing the English-only policy and directed the Department to "fashion proposed policies and practices for the accommodation of Alabama's non-English-speaking residents who seek Alabama's driver's licenses."

The district court made a series of factual findings that are undisputed on appeal. According to its findings, the Department receives more than one million dollars in federal funds every year from the United States Department of Transportation and the Department of Justice. The district court also determined that thousands of Alabama residents of foreign descent suffer adversely from the Department's English-only policy. Dr. Donald Bogie, Director of the Center for Demographics and Cultural Research at Auburn University, presented demographic and census evidence estimating that some 13,000 adult Alabama residents "would have difficulty in obtaining an Alabama driver's license because of the Department's English-only policy." *Sandoval*, 7 F.Supp.2d at 1297.[3] The

[3] Doctor Bogie's demographic statistics were drawn from Bureau of Census reports. His analysis took into account several factors: (1) census and demographic figures for non- or limited-English-speaking Alabama residents; (2) projections of census undercounting for these groups; (3) growth rate projections for these groups; and (4) the primary languages spoken by these

"vast" majority of this group are of foreign descent. *Id.* at 1283.

The district court also heard unrefuted testimony that spoke to the individualized impact of the policy on Alabama residents of foreign descent. Directors Brenda Bullock of the Hispanic Ministry of the Catholic Diocese of Birmingham and Floria Salazar of the Hispanic Ministry of the Catholic Diocese of Mobile testified that they knew of "hundreds" of adult residents of foreign descent who

groups at home. *See Sandoval*, 7 F.Supp.2d at 1295-97. Dr. Bogie explained:

> The census findings indicate that from 1980 to 1990, the number of Alabama residents aged 18 years or older who "did not speak English well" or "did not speak English at all" more than doubled. In the 1980 census, 4,287 persons aged 18 years or older indicated that they "did not speak English well" or "did not speak English at all." In the 1990 census, the number was 10,158 – an increase of 136.9 percent. If the same rate of increase is maintained throughout the 1990's, there will be a projected 24,069 adult Alabama residents in the year 2000 who will not be proficient in English.

See id. Many of these non-English speakers are of foreign descent and census figures project that this Alabama demographic subgroup will increase in number significantly in the coming years. The Bureau of Census projects that the number of Hispanics aged 15 or older will increase by 10,227 during the 1990's (a gain of 61.3 percent), and that during the years 2000 to 2010, the Hispanic state population is estimated to grow 32.4 percent (a gain of another 8,715 persons). Additionally, the Asian and Pacific Islander state population is estimated to grow by 55 percent (a gain of 9,238 persons) during the 1990's and by 32.2 percent during the years 2000 to 2010 (a gain of another 8,300 persons). *See id.*

did not read or speak English fluently, and, as a result, are unable to obtain an Alabama driver's license. *See Sandoval*, 7 F.Supp.2d at 1291-92. Ms. Salazar herself knew of three hundred such adults, many of whom consequently drive without a license. She also testified that not having a license often affected the ability of these adults to obtain employment, child care services, and other life essentials. *See id.*[4]

The district court also heard evidence outlining how the Department made special exam accommodations for other statutorily-protected groups but no accommodations for non-English speakers. Under official state policy, hearing-impaired, illiterate, deaf, and disabled residents receive substantial accommodation on the written exam and road skills test. *See id.* at 1287-89. Illiterate English speakers may take the test orally from a state examiner. Illiterate deaf applicants may make appointments to take the exam in sign language. *See id.* For those hearing-impaired applicants, who cannot adequately read and write English, a video exam is offered. *See id.* Additionally, the Department also grants driver's licenses to applicants of foreign descent who possess valid driver's licenses from other states or countries. These applicants are not required to pass the English-only written exam in

[4] The trial record also contains affidavits from Perla Raines, Secretary of the Montgomery Annex of the Catholic Hispanic Ministry in Montgomery, Alabama, and Boyd F. Campbell, a local lawyer and Chairman of the International Assistance Project of Alabama, a non-profit organization that helps non-citizens adapt to life in Alabama, attesting to their personal knowledge of adult residents of foreign descent unable to obtain driver's licenses in Alabama. *See Sandoval*, 7 F.Supp. at 1292.

order to obtain a state license. *See id.* at 1289-90. Finally, two members of the class, Martha Sandoval and Lorenzo Leon, testified about the policy's deleterious impact on their own lives. *See id.* at 1293-94. Sandoval is a permanent resident alien from Mexico who now lives in Mobile, Alabama. She speaks and understands a very limited amount of English, and cannot read a book in English. Spanish is her primary language. Leon is a permanent resident alien from Mexico who also resides in Mobile, Alabama. His primary language also is Spanish and he understands and speaks only a limited amount of English.

On the basis of this evidence, the district court found that the state policy exerted an adverse and disproportionate impact on non-English-speaking residents who applied for an Alabama driver's license. The court concluded that Appellants' English-only policy "singles out resident non-English speaking applicants by requiring them to take their examination in English only, without the aid of interpreters or translators." *Id.* at 1290.

The district court also reviewed each asserted state justification for the English-only driver's exam policy. The state offered six rationales for the English-only policy: (1) Amendment 509's requirement, (2) highway safety concerns, (3) administrative accommodation concerns, (4) exam integrity concerns, (5) funding concerns, and (6) English is the official language of the United States. The district court found that none of the proffered rationales were " 'substantial legitimate justifications.' " *See id.* at 1297 (quoting *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993)).

On appeal, Appellants do not contest *any* of the district court's findings with respect to these proffered reasons. Among other things, the district court rejected four of the state's principal justifications: (1) highway safety, (2) exam administration, (3) exam integrity, and (4) budgetary constraints. First, the court noted that the state produced *no* evidence at trial that non-English speakers posed greater highway safety risks than English speakers. *See id.* at 1300. Harold Hammond, second-in-command of the Department from 1987 to 1991, and Chief of the Department's Driver's License Division from 1978 to 1987, testified that he was aware of no such evidence from the time of his tenure with the Department. *See id.* Further, the court concluded that the State undermined its own safety rationale through a policy of honoring valid licenses from non-English speakers of other locales, and making test accommodations for illiterate, deaf, and disabled drivers – although these groups might pose theoretically greater safety risks than other population subgroups. *See id.*

Second, the court also found the exam administration and integrity rationales meritless. Trial evidence indicated that, for over a decade, the Department had offered the written exam in fourteen foreign languages without any administrative difficulty. *See id.* at 1302. Trial testimony from department personnel confirmed this conclusion. *See id.* The trial court discounted the validity of exam cheating as a significant concern. *See id.* at 1307-08.

Finally, the district court discerned that the Department could afford to accommodate non-English speakers

within its budgetary limits. The court credited trial testimony stating that financial constraints were not a decisionmaking factor behind the Department's English-only policy. *See id.* at 1313. Trial evidence also established that the Department, prior to the English-only policy, had been able to use volunteer translators, and obtain exam translations at *no* cost. *See id.* At trial, the Department was unable to demonstrate that a return to this policy was not feasible. The district court also determined that even if the Department could not afford translators, other alternatives, like audio-taped instructions or allowing applicants to pay for or provide their own translators, were readily available. *See id.* Finally, the district court found that the annual budget for the Department was $50 million dollars, and that it could afford to hire some professional translators. *See id.* at 1312-13 (finding that translator costs would be minimal). The court concluded that all of these rationales were a pretext, specifically crediting testimony that the Department never had considered ending the translation policy prior to Amendment 509's ratification. *See Sandoval*, 7 F.Supp.2d at 1313.

Pursuant to the district court's order, a stay pending appeal was entered in exchange for Appellants' implementation of a plan for testing in languages other than English. Appellants agreed to procure translations of the examination into Spanish, German, Korean, Japanese, French, Mandarin Chinese, and Vietnamese.

On June 17, 1998, Appellees filed a Motion to Alter or Amend Judgment, requesting that the district court either rule in their favor on their equal protection claim or expressly reserve ruling on that claim. The district court

granted Appellees' motion and reserved ruling on the equal protection claim.

On July 28, 1998, Appellants timely filed a notice of appeal.

II.

We review the district court's conclusions of law *de novo*. *See Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 83 F.3d 1317, 1323 (11th Cir. 1996) (en banc), *vacated on other grounds, Hess v. FDIC*, 117 S. Ct. 760 (1997). Findings of fact, however, may not be disturbed unless they are clearly erroneous. *See* Fed. R. Civ. P. 52(a); *DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 687 (11th Cir. 1997). The entry of a permanent injunction is reviewed for abuse of discretion. *See Simmons v. Conger*, 86 F.3d 1080, 1085 (11th Cir. 1996).

On appeal, Appellants do not challenge the district court's factual findings, its use of Title VII disparate impact principles to analyze Appellants' Title VI claims, or its formulation of the disparate impact analyses. Instead, Appellants make only three broad claims: first, the suit is barred by the Eleventh Amendment; second, Section 602 of Title VI does not contain an implied private cause of action; and finally, an English language policy cannot discriminate on the basis of national origin as a matter of law. We address each claim in turn.

III.

Eleventh Amendment

The Eleventh Amendment to the United States Constitution states: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Amendment also equally bars suits against a state commenced by that state's own citizens. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Hans v. Louisiana*, 134 U.S. 1, 13-15 (1890). Further, the Amendment bans suits against state officials where the state, in fact, is the real party in interest. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) [hereinafter *Pennhurst II*]. In general, these bans prohibit federal courts from exercising subject matter jurisdiction over private party suits filed against a state or state officials.

However, three exceptions to this constitutional bar have been recognized by the Supreme Court. First, individual suits may proceed directly against a state if a state waives its sovereign immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). Second, individual suits against a state also may be adjudicated if Congress, pursuant to a valid exercise of congressional power, abrogates a state's immunity through a clear statement of its intent to abrogate. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996). Finally, individual suits that seek *prospective* relief for *ongoing* violations of federal law also may be levied against state officials. *See Ex Parte Young*, 209 U.S. 123, 159-60 (1908). In the instant case, Appellees

sued both the Department and its Director, L.N. Hagan, in his official capacity. On appeal, Appellants contend that even if Title VI accords Appellees an implied cause of action, the Eleventh Amendment bars this particular suit on sovereign immunity grounds. They contend that Appellees' suit is barred as it relates to both the Department and Director Hagan. Specifically, Appellants present three arguments: first, the Department's acceptance of federal funds does not constitute a waiver of state immunity under the Spending Clause power; second, Title VI does not comprise a valid congressional abrogation of state immunity under Section Five of the Fourteenth Amendment; and finally, the *Ex Parte Young* doctrine does not apply to Director Hagen [sic].

A.

Waiver

It is an "unremarkable" commonplace that states may waive their sovereign immunity through overt consent. *Seminole Tribe*, 517 U.S. at 65; *see also Cate v. Oldham*, 707 F.2d 1176, 1183 n.4 (11th Cir. 1983). It is equally true that a state may waive its sovereign immunity by accepting federal funds. Under the Spending Clause power of Article I, Congress is empowered to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. As the Supreme Court repeatedly has recognized, "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds . . . 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the

recipient with federal statutory and administrative directives.' " *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citations omitted). Moreover, the Spending Clause power is substantial and Congress may accomplish "objectives not thought to be within Article I's 'enumerated legislative fields' . . . through the use of the spending power and the conditional grant of federal funds." *Dole*, 483 U.S. at 208 (quoting *United States v. Butler*, 297 U.S. 1, 66 (1936)). Specifically, under the Spending Clause power, the federal government may condition a waiver of state sovereign immunity upon the receipt of federal monies. *See Atascadero*, 473 U.S. at 238 n.1 (noting that "a State may effectuate a waiver of its constitutional immunity . . . by otherwise waiving its immunity in the context of a particular federal program"); *Edelman*, 415 U.S. at 672 (noting that a state may waive immunity "by its participation in [a] program authorized by Congress"). However, a Spending Clause waiver requires an "unequivocal indication" that a State has consented to federal jurisdiction – either " 'by the most express language or by such overwhelming implication from the text as (will) leave no room for any other reasonable construction.' " *Edelman*, 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). To satisfy this "clear statement" waiver requirement, a statute must evince a "clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247.

Neither side disputes that Title VI, as amended by Section 2000d-7 of the Rehabilitation Act of 1973, explicitly waives state sovereign immunity for Title VI suits in

accordance with the *Atascadero* waiver formula.[5] Passed a year after *Atascadero* was decided, the provision reads in relevant part: "[A] State shall not be immune under the Eleventh Amendment . . . from suit in Federal Court for a violation . . . *of Title VI* . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7

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[5] Appellants, however, contend that this abrogation statement applies only to Title VI and not to its accompanying administrative regulations promulgated under Section 602. This claim is without merit. There is no evidence that Congress somehow differentiated between suits to enforce the statute and suits to enforce the regulations promulgated thereunder when it constructed its abrogation/waiver provision. *See Sandoval*, 7 F.Supp.2d at 1272. The Title VI regulations at issue were promulgated pursuant to the statute's unambiguous directive to federal agencies contained in 42 U.S.C. § 2000d-1. These regulations "effectuate the provisions of Section 2000d" – the statutory prohibition against discrimination – and are not separate from the statute. *See Lau v. Nichols*, 414 U.S. 563, 566-69 (1974). Moreover, when Section 2000d-7 was passed, Congress already had rejected efforts to rescind the disparate impact regulations, and "with full awareness of how agencies were interpreting Title VI, ha[d] modeled later statutes on § 601 of Title VI, thus indicating approval of the administrative definition." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 593 n.14. (1983) (Marshall, J.). From these factors, it is plain that Congress intended Section 2000d-7 to abrogate state immunity with respect to both the statutory provisions and administrative regulations of Title VI. Several lower district courts have reached similar conclusions. *See Bryant v. New Jersey Dept. of Transp.*, 1 F. Supp.2d 426, 431-35 (D.N.J. 1998) (rejecting Eleventh Amendment defense to suit brought entirely under Title VI regulations); *Grimes v. Sobol*, 832 F. Supp. 704, 707 (S.D.N.Y. 1993) (same), *aff'd*, 37 F.3d 857 (2d Cir. 1994).

(emphasis added). The provision's plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity. The Supreme Court has reached this conclusion, describing Section 2000d-7 as an "unambiguous waiver of the States' Eleventh Amendment immunity." *See Lane v. Pena*, 518 U.S. 187, 200 (1996) (drawing this conclusion in the context of a parallel Title IX provision). Indeed, every federal circuit that has considered this issue also has found Section 2000d-7 to constitute a "clear statement" waiver of state sovereign immunity in exchange for the receipt of federal funds. *See Little Rock v. Mauney*, 183 F.3d 816, 821-22 (8th Cir. 1999) (finding Section 2000d-7 to constitute an immunity waiver for Section 1403 of the IDEA, a parallel provision to the Title VI waiver); *Marie O. v. Edgar*, 131 F.3d 610, 617-18 (7th Cir. 1997) (same); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998) (finding Section 2000d-7 to constitute a state immunity waiver for Section 504 of the Rehabilitation Act of 1973, a parallel provision to the Title VI waiver); *see also Beasley v. Alabama State Univ.*, 3 F. Supp.2d 1304, 1307-16 (M.D. Al. 1998) (finding Section 2000d-7 to be a valid waiver under the Spending Clause power for Title IX suits after detailed analysis and discussion).

The recognition of a "clear statement" Spending Clause waiver also is consonant with recent doctrinal developments in sovereign immunity. The Supreme Court has reaffirmed the constitutionality of conditioning federal funds upon the waiver of state sovereign immunity. In *College Savings*, the Court analogized federal monies to "gifts" that a state may accept or reject of its own accord. *See College Savings v. Florida Prepaid Postsecondary Educ.*

Expense Bd., 119 S. Ct. 2219, 2231 (1999). The Supreme Court also recognized that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking of certain actions that Congress could not require them to take, and that acceptance of the fund[s] entails an agreement to the actions," so long as the conditions placed on these funds are not so "coercive" as to eviscerate the "voluntariness of [the] waiver." *Id.* (citation omitted); *see also Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985) (remarking that "it is far from a novel proposition that pursuant to powers under the Spending Clause, Congress may impose conditions on the receipt of federal funds absent some independent constitutional bar"); *Autery v. United States*, 992 F.2d 1523, 1527 n.7 (11th Cir. 1993) (noting that "those who seek federal financial assistance, whether it be states, non-profit organizations, or individuals, have a choice whether to participate in a federal program. But once that decision to participate is made, the grant recipient is bound by any mandatory rules imposed by federal law.").

Unlike the Commerce Clause power, *see* Art. I, § 8, cl. 2, the Spending Clause power does not abrogate state immunity through unilateral federal action. Rather, states are free to accept or reject the terms and conditions of federal funds much like any contractual party. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) [hereinafter *Pennhurst I*] (noting that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions"). In this way, conditioning federal funds on an explicit state waiver of

sovereign immunity does not violate bedrock principles of federalism. As the Supreme Court delineated in *New York*, Congress may offer financial incentives to induce state action so long as "Congress encourages state action rather than compelling it." *New York v. United States*, 505 U.S. 144, 168 (1992). Inducements rather than abrogations leave "the ultimate decision as to whether or not the State will comply" in the hands of the State and its citizens rather than the federal government. *Id.*; *see also Bell v. New Jersey*, 461 U.S. 773, 790 (1983) ("[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty"). Therefore, we can find no constitutional defect inherent in the explicit state immunity waiver enacted pursuant to the Spending Clause in Section 2000d-7.

Nevertheless, Appellants argue that although they have continued to accept federal funding after the effective date of Section 2000d-7, their grant agreements with the Department of Transportation and Department of Justice fail to obligate Alabama to administer driver's license exams in foreign languages. Appellants claim that because Title VI is Spending Clause legislation, *see Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1398-99 (11th Cir. 1997) (en banc) (describing Title VI as Spending Clause legislation for statutory construction purposes), *rev'd on other grounds, Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999), they are entitled to explicit notice that accepting federal funds prohibits them from requiring exam applicants to take an English language driver's exam. We are not persuaded by Appellants' claim that

they were provided insufficient notice of their obligations under Title VI.

As discussed earlier, Spending Clause legislation functions as a quasi-contract between Congress and the States. *See Pennhurst I*, 451 U.S. at 17. Under this financial arrangement, Congress may attach conditions on those states who accept federal funds – provided " 'Congress speak[s] with a clear voice' " in outlining its conditions. *Davis*, 119 S. Ct. at 1670 (quoting *Pennhurst I*, 451 U.S. at 17). In determining whether a statute and its accompanying administrative regulations provide recipient states with the requisite level of notice for imposing funding conditions, we rely on traditional methods of statutory construction. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 286 n.15 (1987). However, once Congress clearly signals its intent to attach federal conditions to Spending Clause legislation, it need not specifically identify and proscribe in advance every conceivable state action that would be improper. *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 666-69 (1985) (noting that federal grant programs cannot prospectively resolve every possible "ambiguity" concerning particular applications of their statutory requirements).

In this case, Alabama received ample notice of its nondiscrimination obligations under Title VI. Title VI flatly prohibits discrimination on the basis of national origin and, in turn, English language policies that cause a disparate impact on the basis of national origin. Section 601 of Title VI forbids discrimination based on "national origin, in *any* program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (emphasis added). Section 602 of the Act also grants federal agencies like the

Department of Transportation and the Department of Justice the authority to issue rules and regulations to ensure that recipients of federal aid "conduct any federally financed projects consistently with Section 601." *Lau v. Nichols*, 414 U.S. 563, 566 (1974). The Supreme Court consistently has held that recipients of federal funds must comply with Title VI's nondiscrimination mandate as well as the statute's implementing regulations as promulgated by federal administrative agencies. *See id.* at 570-71 (Stewart, J., concurring). Moreover, agency regulations are accorded substantial deference in assessing whether they outline a permissible construction of a congressional statute's purpose. *See Chevron, U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *United States v. Board of Trustees for the Univ. of Alabama*, 908 F.2d 740, 746-47 (11th Cir. 1990).

In this case, a number of federal agencies articulated implementing regulations for Title VI, plainly notifying recipient states like Alabama of their duty not to engage in policies causing a disparate impact based on national origin. Department of Transportation and Department of Justice regulations prohibit grant recipients from employing "criteria or methods of administration which have the effect of subjecting [individuals] to discrimination because of their . . . national origin." 49 C.F.R. 21.5(b)(2)(DOT); 28 C.F.R. § 42.104(b)(2)(DOJ) (same). Indeed, the Department of Justice, the principal federal agency for coordinating Title VI requirements,[6] also has

[6] When Congress entrusts more than one federal agency to enforce a statute, the Supreme Court has accorded wide deference to the regulations promulgated by the agency charged

promulgated a longstanding regulation instructing all executive agencies on when grant recipients must provide foreign language assistance:

> Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, *the recipient shall take reasonable steps, considering the size and concentration of such population, to provide information in appropriate languages to such persons.* This requirement applies with regard to written material of the type which is ordinarily distributed to the public.

28 C.F.R. § 42.405(d)(1) (1976) (emphasis added). Moreover, other federal agencies also have adopted longstanding positions that the denial of benefits to non-English speakers may yield a disparate impact based on national origin in violation of Title VI.[7] Notably, Appellants do not

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by Executive Order with coordinating government-wide compliance. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984). In this case, the Department of Justice has been authorized by Executive Order to coordinate government-wide compliance with Title VI. *See* Exec. Order No. 11,247, 30 Fed. Reg. 12327 (1965); Exec. Order No. 12250, 45 Fed. Reg. 72, 995 (1980).

[7] The Department of Health, Education, and Welfare ("HEW"), the predecessor to the Department of Education ("DOE"), issued a 1970 policy memorandum informing that "[w]here [the] inability to speak and understand the English language excludes national origin-minority group children from *effective participation* in the educational program offered by a

contest these longstanding federal agency interpretations of Title VI.

Moreover, the Supreme Court specifically has read Title VI and its implementing regulations to prohibit English language policies which yield a disparate impact on non-English speakers. In *Lau*, a large group of Chinese-speaking minority students were denied supplemental English language instruction by the San Francisco

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school district, the district must take affirmative steps . . . to open its instructional program to these students." 35 Fed.Reg. 11,595 (1970). As recently as last year, the Department of Health and Human Services ("HHS") issued a guidance memorandum stating that "[t]he United States is . . . home to millions of national origin minority individuals who are limited in their ability to speak, read, write, and understand the English language [and that] [b]ecause of these language barriers, [limited English proficiency (LEP)] persons are often excluded from programs or experience delays or denials of services from recipients of Federal assistance." The memo concluded that "[w]here such barriers *discriminate or have had the effect of discriminating on the basis of national origin*, OCR [the Office of Civil Rights] has required recipients to provide language assistance to LEP persons." U.S. Dept. of Health and Human Services' Office of Civil Rights Memorandum, *Title VI Prohibition Against National Origin Discrimination-Persons with Limited English Proficiency*, at 1-2 (1998) (emphasis added); *see Sandoval* 7 F.Supp.2d at 1282. Since 1980, the agency "has conducted a large number of complaint investigations and compliance reviews in this area. In these cases, OCR [the Office of Civil Rights] has consistently concluded that recipients have an obligation under Title VI to communicate effectively with persons of limited English proficiency." 45 Fed.Reg. 82,972 (1980).

school system. Regulations promulgated by the Department of Health, Education, and Welfare ("HEW") under Section 602 of Title VI required:

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students . . . Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track.

Id. at 568.

Based on the validity of these regulations as an interpretation of the substantive meaning of Title VI, the Supreme Court found the school district's language policy to clearly violate Title VI. *See id.* at 568; *id.* at 571 (Stewart, J., concurring). The Supreme Court explained:

> [I]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program – all earmarks of the discrimination banned by the [HEW] regulations.

Id. at 568. Further, the Supreme Court determined that the HEW regulations properly attached nondiscrimination conditions to funding recipients under the Spending

Clause power. *Id.* at 568-69 (finding that "the Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed," and that as a result, "[r]espondent school district contractually agreed to 'comply with title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the Regulation of HEW") (quoting *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 142-43 (1947)). Rejecting the claim that the school lacked proper notice of its Title VI obligations, the Supreme Court concluded that "whatever may be the limits of [the Spending Clause] power, they have not been reached here." *Lau*, 414 U.S. at 569. The *Lau* decision subsequently was ratified by Congress in its Education Amendments of 1974, Pub. L. No. 93-380, §§ 105, 204, 88 Stat. 503-512, 515 (codified at 20 U.S.C. 1703(f), and Bilingual Education Act, 20 U.S.C. § 7401 *et seq.*).[8] Therefore, *Lau* and its subsequent legislative history also unambiguously notify state recipients of federal funds that English language policies, which cause a disparate impact on the ability of

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[8] These enactments adopted the holding of *Lau* and provided funds to aid local school districts in providing bilingual education to comply with *Lau* and Title VI. *See* 20 U.S.C. 7402(a)(15) (stating that the "Federal Government as exemplified by Title VI of the Civil Rights Act of 1964 . . . has a special and continuing obligation to take appropriate action to provide equal educational opportunities to children and youth of limited English proficiency"); *Castaneda v. Pickard*, 648 F.2d 989, 1008 (5th Cir. 1981) (noting that Congress subsequently adopted the "essential" holding of *Lau* in the Education Amendments of 1974 and the Bilingual Education Act).

non-English speakers to enjoy federal benefits, may violate Title VI.[9]

This conclusion is altogether consonant with our approach to other federal civil rights provisions. In *Arline,* the Supreme Court rejected a *Pennhurst I* lack of notice claim with respect to Section 504 of the Rehabilitation Act. *See id.* at 286 n.15. The Court found that the Act's legislative history combined with its implementing administrative regulations adequately notified recipient

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[9] Appellants contend that *Lau* is inapposite because the decision merely required supplemental English language instruction for Chinese-American students, and did not mandate that the school district "speak in foreign tongues" to the students. In fact, the *Lau* court thrust *no* specific remedy on the district. The Supreme Court found that the district had to take "affirmative steps" to rectify the language-oriented disparate impact but left the district's remedial options flexible. The Court explained:

> No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another.

Id., 414 U.S. at 564-65. We interpret this instruction as an order to the school district to remedy the disparate impact by the most efficacious means available – leaving the ultimate policy choice to the expert opinion of the district's educators. Similarly, here, the district court found Appellants' English-only policy to exert a disparate impact based on national origin, and ordered Appellants to "fashion proposed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses." No specific policy has been mandated by the district court, and Appellants have yet to submit a compliance proposal. We therefore deem it premature to speculate on the appropriateness of potential court-imposed remedies.

states of their statutory obligations not to discriminate. *See id.*[10] Following *Arline,* our circuit has read federal antidiscrimination statutes similarly in evaluating whether they provide sufficient notice to recipient states. We have looked *both* to a statute's legislative history and subsequently-promulgated implementing regulations in assessing the breadth of a statute's funding conditions. In *Board of Trustees,* for example, we interpreted Section 504 of the Rehabilitation Act of 1973 to provide notice to the States that they could be required to provide and pay for interpreters for deaf persons. *See Board of Trustees,* 908 F.2d at 750. There, we concluded that despite "Section 504's general language and sparse legislative history," it was reasonable for HEW to interpret the statute, through implementing regulations, to require state interpreters for the deaf as a "related service" under the Act. *Id.* at 748.[11]

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[10] The *Arline* Court explained, "[i]n *Pennhurst* . . . the statutory provisions were thought to be only statements of 'findings' indicating no more than a congressional preference – at most a 'nudge in the preferred directio[n.]' The contrast between the congressional preference at issue in *Pennhurst* and the antidiscrimination mandate of § 504 could not be more stark." *Arline,* 480 U.S. at 280 n. 15 (quoting *Pennhurst I,* 451 U.S. at 17).

[11] In reaching this result, we noted that administrative agency constructions of a statute are entitled to substantial deference. *See id.* (citing *Chevron,* 467 U.S. at 843; *Arline,* 480 U.S. at 279). As a result, we deferred to an agency interpretation to determine the breadth of the antidiscrimination provision at issue. We explained, "HEW's decision that the provision of interpreters is necessary to comply with the non-discrimination mandate of Section 504, and does not amount to an affirmative action requirement, is a policy choice that HEW is empowered to make." *Board of Trustees,* 908 F.2d at 749 (stating that " '[t]he

With Title VI, there is an even clearer legislative purpose of remedying pervasive discrimination.[12]

Moreover, this nondiscrimination purpose is supplemented by multiple administrative agency regulations expressly associating disparate impact English language

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power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left . . . by Congress.' ") (quoting *Chevron*, 467 U.S. at 843) (citation omitted). The Supreme Court employed a similar approach in *Irving*. There, the Court held that under the Education of the Handicapped Act, it was appropriate to rely on *agency regulations in* determining the breadth of the "related" services that the states were bound to provide. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-92 & n.8 (1984).

[12] The legislative record is replete with descriptions of Title VI as a remedial statute. For example, Senator Hubert Humphrey, the Senate manager of the Civil Rights Act of 1964, explained that the objective of Title VI was to "make sure that the funds of the United States are not used to support racial discrimination." 110 Cong. Rec. 6544 (Statement by Sen. Humphrey). Senator Pastore made the point more directly:

> That is why we need Title VI of the Civil Rights Act, H.R. 7152 – to prevent such discrimination where Federal funds are involved. . . . Title VI is sound; it is morally right; it is legally right; it is constitutionally right. . . . What will it accomplish? It will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind. Let me say it again. The title has a simple purpose – to eliminate discrimination in federally financed programs.

110 Cong. Rec. 7054 (1964) (Statement by Sen. Pastore). *See also Guardians*, 463 U.S. at 591-92 (White, J.); *id.* at 620-22 (Marshall, J.); *id.* at 643-45 (Stevens, J., Brennan, J., Blackmun, J.); *Lau*, 414 U.S. at 570.

policies with national origin discrimination. In fact, there was evidence that Alabama possessed actual notice that the English-only policy violated Title VI. As we have noted, the Alabama Attorney General issued an advisory opinion on the English-only state amendment which warned that "requiring an ability to understand English as a requirement to participate in some state programs might be a violation of Title VI of the Civil Rights Act of 1964." *See Sandoval*, 7 F.Supp.2d at 1286.

Nevertheless, Appellants argue that Title VI does not require federal grantees to refrain from implementing English-only policies, citing two circuit court cases, *Gloor*, a Fifth Circuit case with binding force on our circuit's case law,[13] and *Spun Steak*, a Ninth Circuit case, for this proposition. Both cases are inapposite. In *Gloor* and *Spun Steak, bilingual* plaintiffs brought Title VII suits asserting that English-only workplace policies constituted a disparate *impact* based on national origin. *See Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980); *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993). While both courts rejected these claims, their decisions rested on the *bilingual* status of the plaintiffs. As bilingual speakers, the plaintiffs did not suffer an adverse impact from being required to speak in English while at work. *See Gloor*, 618 F.2d at 270-71; *Spun Steak*, 998 F.2d at 1490. Notably, this case does not involve bilingual speakers but rather license applicants not proficient in the English language at all. As the *Gloor* court distinguished, "to a person who speaks only one tongue

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[13] Decisions by the Fifth Circuit prior to September 30, 1981 constitute binding precedent in our circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex, or place of birth." *Id.* at 270. Under *Gloor*'s dicta, plaintiffs, like Martha Sandoval, could bring a disparate impact suit under Title VI. *See id.* Nothing in *Gloor* suggests otherwise.[14] In short, Appellants had "adequate" notice that

[14] Appellants also rely on *Gebser*. In *Gebser*, the Supreme Court ruled that a school district receiving federal funding under Title IX could not be held liable for money damages resulting from a teacher's sexual harassment of a student in the absence of actual notice and deliberate indifference on the part of the district. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1998-1999 (1998). *Gebser* is distinguishable; notably, it involved monetary liability arising from the actions of an unauthorized third party. In contrast, this case involves only injunctive relief for official state policy. Further, the *Gebser* Court specifically distinguished its case posture from situations involving "official policy of the recipient entity." *See id.* at 1999. The Supreme Court never has held that a state must have actual notice of its policy's unlawfulness to be liable for injunctive relief. In fact, the Court specifically has authorized injunctive relief under Title VI despite the fact that "where discrimination is unintentional, 'it surely is not obvious that the grantee was aware that it was administering the program in violation of the [condition].' " *Id.* at 1998 (quoting *Guardians*, 463 U.S. at 598). Additionally, injunctive relief does not carry quite the same liability consequences as compensatory relief. At bottom, notice is a fairness argument; namely, a defendant did not know that his conduct was unlawful or harmful, and therefore should not be forced to remunerate the plaintiff. Injunctive relief involves no compensation. It requires a defendant to stop its unlawful activity. For this reason, the Supreme Court has distinguished between injunctive and compensatory relief in terms of the applicable notice standard. Compensatory relief requires actual notice. *See Gebser*, 118 S. Ct. at 1999; *Davis*, 119 S. Ct. at 1664. Injunctive relief based on an implied cause of action only

their English-only driver's license exam requirement violated Title VI. *Davis*, 119 S. Ct. at 1664 (concluding that Spending Clause legislation only must provide recipient states with "adequate" notice).

We therefore hold that the Alabama Department of Public Safety by voluntarily accepting these federal monies has waived any claim of sovereign immunity from individual Title VI suits. Appellees' suit is not barred by the Eleventh Amendment against the State of Alabama.[15]

B.

Ex Parte Young

Even if the Eleventh Amendment barred Appellees' action against the State of Alabama – and we do not believe it does – Appellees' suit, as it relates to Director Hagan, in his official capacity, still could proceed, and Appellees still could obtain *injunctive* relief against the Department's English-only exam policy. Since *Ex Parte Young*, suits directed against state officials that seek *prospective* relief for *continuing* violations are not barred on Eleventh Amendment grounds. *See Ex Parte Young*, 209

requires "adequate" notice. *See Davis*, 119 S. Ct. at 1664, 1670-71; *Guardians*, 463 U.S. at 598. These differences render *Gebser* and *Davis* inapposite.

[15] Because we hold that Alabama properly waived its sovereign immunity by receiving federal funds from the Department of Transportation and the Department of Justice, we need not address Appellants' congressional abrogation claim.

U.S. 123 (1908). This doctrinal exception to state sovereign immunity is well-established. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) (reaffirming that a plaintiff seeking prospective relief against a state official's ongoing violation of federal law can proceed in federal court); *Summit Medical Assoc. v. Pryor*, 180 F.3d 1326, 1336-38 (11th Cir. 1999) (same). The doctrine prohibits state officers from enforcing state policies in violation of the Constitution or federal law under a legal "fiction" that "creates an imaginary distinction between the state and its officers, deeming the officers to act without the state's authority, and hence, without immunity protection, when they enforce state laws in derogation" of federal or constitutional rights. *Id.* at 1337.

The applicability of the doctrine turns on three considerations; first, does the Plaintiff seek prospective or retrospective relief; second, is the violation ongoing and continuous; and finally, would equitable relief " 'implicate special sovereignty interests.' " *Id.* at 1337 (quoting *Coeur d'Alene*, 521 U.S. at 281). Both parties agree that the first two considerations are easily satisfied. Appellees seek prospective relief in the form of a permanent injunction for alleged ongoing violations of Title VI. However, Appellants rely on *Seminole Tribe* in arguing that the suit implicates "special sovereignty interests" because Section 602 of Title VI evinces a congressional intent to avoid *Ex Parte Young* remedies. *Id.*, 517 U.S. at 59. We are not persuaded. First, we have concluded, *infra*, in Part IV, that a private cause of action is consonant with Section 602 of Title VI. The Supreme Court also has held that Title VI's statutory scheme is not inconsistent with a private right of action, *see Cannon v. Univ. of Chicago*, 441 U.S. 677,

704 (1979); *Guardians*, 463 U.S. at 592-93; *id.* at 620-22 (Marshall, J.); *id.* at 641-45 (Stevens, J., Brennan, J., Blackmun, J.). Second, we find no comparison between the intricate remedial scheme of the Indian Gaming Regulatory Act ("IGRA") at issue in *Seminole Tribe* and Section 602 of Title VI. Title VI, unlike the IGRA, contains no explicit remedial scheme for private rights of action. Instead, such suits would be governed by the "general rule" under which "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 70-71. Third, we already have found injunctive relief to be "appropriate" relief for a private cause of action under the Title VI framework. *See Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190, 1201 n. 37 (11th Cir. 1991). Fourth, the remedial framework outlined in Title VI applies to grant and fund terminations by the federal government and not to private suits. *See* 42 U.S.C. § 2000d-1. Title VI also contains no express limitations on the remedial powers of federal courts, unlike the IGRA. *Compare* 42 U.S.C. § 2000d-1, *with Seminole Tribe*, 517 U.S. at 59-60. Finally, our circuit also has allowed private suits to proceed under the doctrine of *Ex Parte Young* for injunctive relief under Section 504 of the Rehabilitation Act. *See, e.g., Lussier v. Dugger*, 904 F.2d 661, 670 n. 10 (11th Cir. 1991). Section 504 expressly incorporates Title VI remedies, *see* 29 U.S.C. § 794(a)(2), and consistently has been construed as being similar to Title VI for statutory construction purposes. *See Alexander v. Choate*, 469 U.S. 287, 294-95 (1985). For these reasons, we conclude that Appellees'

suit is not barred under *Seminole Tribe*'s modification of *Ex Parte Young*.

IV.

Implied Cause of Action

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits any recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally funded program.[16] The Supreme Court has recognized an implied *private* cause of action to enforce Section 601. *See Alexander v. Choate*, 469 U.S. 287, 293-94 (1985); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 607 n. 27 (1983); *id.* at 608 n. 1 (Powell, J., concurring in judgment). To state a Section 601 claim, just like a claim arising under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must establish the funding recipient's discriminatory intent. *See Alexander*, 469 U.S. at 293; *see also United States v. Fordice*, 505 U.S. 717, 732 n. 7 (1992); *Elston*, 997 F.2d at 1405 n. 11, 1406; *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985)).

Section 602 of Title VI expressly authorizes federal agencies to promulgate rules and regulations to effectuate

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[16] Section 601 of Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d.

the provisions of Title VI.[17] The Supreme Court has held that agencies have the authority to promulgate

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[17] Section 602 of Title VI provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal

regulations under Section 602 that prohibit funding recipients from taking any action that *results* in a disparate impact or produces discriminatory *effects* on the basis of race, color, or national origin. *See Guardians*, 463 U.S. at 584 n. 2 (White, J.); *id.* at 623 n. 15 (Marshall, J.); *id.* at 642-45 (Stevens, Brennan, Blackmun, JJ.); *see also Alexander*, 469 U.S. at 293; *Lau*, 414 U.S. at 568; *id.* at 571 (Stewart, J., concurring). Here, the parties concede that the Department of Public Safety is subject to such regulations through monies it receives both from the Department of Transportation and the Department of Justice. The relevant regulations state:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of persons to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program; *may not, directly or through contractual or other arrangements, utilize criteria or other methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin*, or have the effect of defeating or substantially impairing

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> department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1.

> accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.[18]

49 C.F.R. § 21.5(b)(2) (Department of Transportation) (emphasis added); 28 C.F.R. § 42.104(b)(2) (Department of Justice) (same).

The central issue presented then is whether Appellees may enforce these agency regulations against Director Hagan and the Department, absent any express statutory authorization. In other words, we must determine whether there is an implied private cause of action to enforce agency regulations promulgated under Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1. Appellants contend that the district court erred in holding that a private cause of action exists. We disagree. Our court has repeatedly recognized an implied private cause of action under Title VI to enforce the disparate impact regulations promulgated pursuant to Section 602. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1202-03 (11th Cir. 1999); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Georgia State Conference of Branches of NAACP*, 775 F.2d 1403, 1417 (11th Cir. 1985). Moreover, our circuit precedent is reinforced both by Supreme Court case law and the uniform position taken by our sister circuits.

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[18] "Services, financial aid, or other benefits provided under a program receiving Federal assistance [is defined as] . . . any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance." 49 C.F.R. § 21.5(b)(4) (Department of Transportation); 28 C.F.R. § 42.102 (Department of Justice) (same).

We have recognized an implied private cause of action to enforce disparate impact regulations arising under Title VI three times. Appellants argue that our caselaw merely assumes *arguendo* that such a cause of action exists under Title VI. We disagree. First, in *Georgia State Conference of Branches of NAACP*, thirty-five black schoolchildren sued the Georgia State Board of Education alleging, among other things, that black students were assigned to programs for the mentally retarded in a racially discriminatory manner in violation of the Thirteenth Amendment, the Fourteenth Amendment, *and* Title VI and its implementing regulations. *See Georgia State*, 775 F.2d at 1407-08. The case was tried without a jury and the district court entered judgment for the defendants on the constitutional and Title VI claims. *See id.* at 1408. On appeal, we considered whether the district court properly applied "disparate impact tests" in evaluating the plaintiffs' Title VI claim. *Id.* at 1416. The defendants, relying on *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. Unit A 1981), argued that Title VI's nondiscrimination provisions were coextensive with the Fourteenth Amendment, and required a showing of discriminatory intent for *all* private suits. In short, they claimed that disparate impact *alone* could not support a finding of Title VI liability. Applying Supreme Court precedent in *Guardians* and *Alexander*, we squarely rejected that theory. In so doing, we observed that *Castaneda* no longer was good law on this point because a plurality of Justices in *Guardians* had endorsed the viability of a Title VI disparate impact suit based on administrative agency regulations. *Georgia State*, 775 F.2d at 1417 (finding that "five Justices [in *Guardians*] were of the opinion that the regulations promulgated under Title

VI permit the filing of suits alleging a disparate impact theory"). We concluded, "[t]here is no doubt that the plaintiffs predicated this cause of action on the [agency] regulations. As a result, the district court correctly applied the disparate *impact* analyses to their Title VI claims." *Id.* We then turned to the merits of the disparate impact analyses and concluded that the district court's findings as to the educational soundness of the defendants' practices were not clearly erroneous. *See id.* at 1419. In *Georgia State*, we therefore plainly recognized that private plaintiffs may sue to enforce disparate impact regulations arising under Title VI without a showing of discriminatory intent as required by Section 601 of Title VI.

Then, in *Elston v. Talladega County Board of Education*, we reiterated this point. There, we considered again a *private* claim brought by a class of black students and their parents against the Talladega County Board of Education alleging that the board's efforts at restructuring its school system violated the First and Fourteenth Amendments, Title VI and its implementing regulations, and Alabama Code § 36-12-40. *See Elston*, 997 F.2d at 1400. Applying disparate *impact* analyses, the district court held, among other things, that because the board's actions did not have any discriminatory effect on blacks, the plaintiffs had failed to demonstrate a violation of the Title VI regulations. *See id.* at 1404. On appeal, we assumed *arguendo* that the plaintiffs maintained a proper cause of action based on the disparate impact agency regulations, and we affirmed the judgment of the district court. *See id.* at 1406-07.

Most recently, in *Burton v. City of Belle Glade*, we unambiguously recognized that the black tenants of a housing project could maintain an implied cause of action to enforce the disparate impact regulations promulgated by the Department of Agriculture pursuant to Section 602 of Title VI. *See Belle Glade*, 178 F.3d at 1202-03. Although we remanded the case to the district court for further proceedings, we reaffirmed the validity of an implied *private* cause of action under Section 602. *See id.* (observing that "we have recognized an implied private right of action to enforce the regulations promulgated under section 602 of Title VI"). In short, our precedent has unambiguously recognized an implied cause of action to enforce disparate impact regulations promulgated pursuant to Section 602 of Title VI.

Moreover, this view is the consistent position of at least eight other courts of appeals. Without detailed discussion, seven of our sister circuits have indicated that an implied *private* cause of action exists under Section 602. *See Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1356 n. 5 (6th Cir. 1996) (citing *Guardians* for the proposition that "a [private] plaintiff may pursue a claim under a disparate impact theory" pursuant to Section 602 of Title VI) (citation omitted); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996) (noting "[a]lthough Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent") (citation omitted); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (stating that "a plaintiff alleging a violation of the DOT regulations [under Section

602 of Title VI] must make a prima facie showing that the alleged conduct has a disparate impact") (citations omitted); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988) (declaring "[i]t is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act. Moreover, plaintiffs need not show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations.") (citation omitted); *Castaneda by Castaneda v. Pickard*, 781 F.2d 456, 465 n. 11 (5th Cir. 1986) (explaining that "a Title VI action can now be maintained in either the guise of a disparate treatment case, where proof of discriminatory motive is critical, or in the guise of a disparate impact case. . . . In this latter type of case, proof of discriminatory intent is not necessary.") (citation omitted); *Latinos Unidos De Chelsea v. Secretary of Hous. & Dev.*, 799 F.2d 774, 785 n. 20 (1st Cir. 1986) (noting "under the statute itself, plaintiffs must make a showing of discriminatory intent; under the regulations, plaintiffs simply must show a discriminatory impact") (citation omitted); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 981-82 (9th Cir. 1984) (finding that "proof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute rather than the statute itself") (footnote omitted).

The only other circuit to have addressed the issue in detail also concluded that an implied private cause of action exists under Section 602 of Title VI. *See Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 936-37 (3d Cir. 1997), vacated as moot, 119 S. Ct. 22 (1998). In *Seif*, the Third Circuit read Supreme Court precedent in *Guardians* and *Alexander* to strongly suggest

that an implied private cause of action exists under Section 602. *See id.* at 929-31. The Seif court then determined that an implied private right of action was supported both by Title VI's legislative scheme and legislative history. *See id.* at 933-36.

Moreover, our own independent review of Supreme Court case law confirms the view that Title VI creates a private implied cause of action to enforce the disparate impact regulations promulgated under Section 602. Although the Court has yet to squarely answer the question before us, we believe that a close reading of *Lau*, *Guardians*, and *Alexander* necessarily establishes several holdings logically supporting an implied private cause of action under Section 602 of Title VI. To begin, in *Lau*, the Supreme Court held that HEW regulations – promulgated pursuant to Section 602 and establishing a disparate impact standard under Title VI – were valid interpretations of Title VI's substantive contours. *See Lau*, 414 U.S. at 568 (finding that HEW regulations authorized a Title VI disparate impact claim under Section 601); *Id.* at 571 (Stewart, J., concurring). As explained earlier, *Lau* relied on these agency regulations to recognize a *private* plaintiff disparate impact suit under Title VI against a local school district that received federal funds while enforcing a policy of not providing supplemental language instruction to non-English proficient Asian students. *See id.* at 566-68. The HEW regulations relied on in *Lau* are substantially similar to the Department of Transportation and Department of Justice regulations of the instant case.[19]

[19] *Compare* 45 C.F.R. 80.3(b)(1) (HEW), *with* 49 C.F.R. § 21.5(b)(2) (DOT), *and* 28 C.F.R. § 42.104(b)(2) (DOJ) (same).

Furthermore, the *Lau* Court also held that these disparate impact regulations did not exceed the statutory authority of Title VI because they " 'reasonably related' " to the statute's antidiscrimination purposes. *See id.* at 571 (Stewart, J., concurring) (citation omitted). Although *Lau* rested its holding under Section 601 of Title VI, its outcome and reasoning clearly were based on the conclusion that agency regulations promulgated under Section 602 could create a disparate impact standard of liability. *See id.* at 568; *id.* at 571 (Stewart, J., concurring) (noting the "critical question is whether the [Section 602] regulations and guidelines promulgated by HEW go beyond the authority of Section 601").

Five Justices in *Guardians* reaffirmed this holding of *Lau*.[20] *Guardians* also involved a *private* suit by black and Hispanic police officers alleging, *inter alia*, that their

[20] The *Lau* holding was indirectly questioned in *Bakke* where a majority of the Supreme Court joined a concurrence that read Title VI's provisions as co-extensive with the Fourteenth Amendment. *See Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 325 (1978) (noting that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause"). One year earlier, the Supreme Court in *Arlington Heights* had reaffirmed the *Washington v. Davis* holding that equal protection violations of the Fourteenth Amendment required a showing of discriminatory intent. *See Village of Arlington Heights v. Metro. Housing. Dev. Corp.*, 429 U.S. 252, 264 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 242-44 (1976)). *Lau*'s recognition of a disparate impact theory of liability under Title VI implementing regulations seemed at odds with this *Bakke* dicta. *Guardians* settled this question by reaffirming that, when based on federal agency regulations promulgated under Section 602 authority, a disparate impact cause of action for declaratory and injunctive relief by private plaintiffs could be maintained.

department's lay-off policy violated Title VI. In a plurality opinion, five Justices endorsed the view that Section 602 implementing regulations could support declaratory or injunctive relief for private plaintiffs under Title VI. *See Alexander*, 469 U.S. at 293; *Guardians*, 463 U.S. at 584 (White, J.); *id.* at 615 (Marshall, J.); *id.* at 641-45 (Stevens, Brennan, Blackmun, JJ.). While the Justices did not explicitly address whether an implied private right of action existed under Section 602, their analysis strongly supports recognizing such a right. All five of the plurality members would allow *private* plaintiffs to sue for injunctive or declaratory relief on the basis of Section 602 disparate impact regulations that prohibit recipients of federal funds from enforcing policies with discriminatory effects on protected minority groups. *See id.* at 584, 589-93 (White, J.); *id.* at 615 (Marshall, J.); *id.* at 641-45 (Stevens, Brennan, Blackmun, JJ.). Moreover, the agency regulations supporting this private cause of action are promulgated under the authority of Section 602 of Title VI to "effectuate" the statute's purposes as outlined in Section 601. *See* 42 U.S.C. § 2000d-1.

Finally, this inference also draws support from the language of the plurality opinions. In announcing the decision, Justice White explained:

> the threshold issue before the Court is *whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964, and administrative implementing regulations promulgated thereunder*. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent. However, I conclude that the judgment below should

> be affirmed on other grounds, because, in the absence of discriminatory animus, compensatory relief should not be awarded to *private* Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available *private* remedies for Title VI violations.

Id. at 584 (emphasis added). Justice White's crucial fifth vote unambiguously contemplated the right of *private* plaintiffs to obtain injunctive and declaratory relief under disparate impact agency regulations promulgated under the authority of Section 602. The opinions of the four other plurality members also support a similar interpretation. Writing for himself, Justice Marshall explained that he would reaffirm *Lau* in full and allow private parties the right to sue under Title VI for disparate impact claims. *See id.* at 623-24. The three other plurality members also indicated support for a *private* party suit to enforce Section 602 agency regulations prohibiting disparate impact violations – albeit on different grounds. They reasoned that the Section 602 disparate impact regulations constitute "valid federal law" and that private parties may sue under Section 1983 to obtain both injunctive and compensatory relief for violations of the regulations' terms. *See id.* at 645 (Stevens, Brennan, Blackmun, JJ.). In *Guardians*, the plaintiffs sued under Section 1983 to enforce Title VI and did not base their cause of action on Section 602 alone.[21] Justice Stevens' opinion omitted a discussion of whether an implied cause of action exists under Section 602 regulations, noting in a footnote that

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[21] In this case, plaintiffs relied on Section 602 directly rather than basing their cause of action on Section 1983.

the issue was not presented directly before them. *See id.* at 645 n. 18. However, despite this caveat, his opinion endorsed all of the analytical predicates necessary for recognizing an implied private cause of action under Section 602. It agreed that (1) disparate impact regulations, (2) promulgated under Section 602 authority, (3) represent valid federal law (4) consonant with Title VI's legislative scheme (5) and legislative history, and (6) may be enforced by *private* parties (7) to obtain declaratory, injunctive, or compensatory relief. *See id.* at 641-45.[22] We therefore read *Guardians* to suggest strongly the existence of an implied private cause of action under Section 602.[23]

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[22] These findings prompted the conclusion:

> [We] would hold that a court has broad discretion to remedy violations of Title VI in actions brought by private parties . . . [b]ecause the relief petitioners received was available to them under Title VI, and because that relief was justified without proof of discriminatory intent. . . . [Although] the petitioners had to prove that respondents' actions were motivated by an invidious intent in order to prove a violation of the statute, they only had to show that the respondents were producing discriminatory effects in order to prove a violation of valid federal law.

Id. at 645 (Stevens, Brennan, Blackmun, JJ.)

[23] This conclusion also draws reinforcement from dicta in *Alexander*. In *Alexander*, a private party disparate impact suit brought under federal agency implementing regulations pursuant to Section 504 of the Rehabilitation Act of 1973, a unanimous Supreme Court offered a clarification of the *Guardians* holding.

> First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were read [sic] enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

See Alexander, 469 U.S. at 293-94. Moreover, in applying the *Guardians* holding to the facts of *Alexander*, the Court also explained that "to the extent our holding in *Guardians* is relevant to the interpretation of § 504, *Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, *could make actionable* the disparate impact challenged in this case." *Id.* at 294 (emphasis added). The opinion explained its hesitancy in applying *Guardians* directly to *Alexander* by distinguishing the legislative history and case law surrounding Title VI and Section 504. *See id.* at 295 & n. 11. Nevertheless, the treatment of *Guardians* in *Alexander* suggests that the *Guardians* plurality supported a private cause of action based on the implementing regulations. Any other conclusion would be inconsistent with the claim in *Alexander* that *Guardians* lends support for the notion that the implementing regulations of Section 504 could create a private disparate impact cause of action. Only if *Guardians* recognized or strongly supported an implied cause of action based on Title VI agency regulations would the decision lend support for finding an implied cause of action under agency regulations promulgated under a statute similar to Title VI.

In short, we read *Lau*, *Guardians*, and *Alexander*, *in pari materia*, to logically support finding an implied private cause of action under Section 602.[24] These cases

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[24] Appellants argue that the Supreme Court in *United States v. Fordice* overruled *Guardians* and *Lau* in a footnote of an opinion authored by Justice White, the crucial fifth vote for the *Guardians* plurality. The footnote states, "private petitioners

establish three important holdings: (1) disparate impact regulations promulgated pursuant to Section 602 of Title VI constitute an authoritative construction of Title VI's antidiscrimination provisions; (2) private parties may enforce these regulations to obtain declaratory and injunctive relief; and (3) Title VI's legislative history and scheme unequivocally support an implied cause of action under Section 601 and Section 602. For these reasons, we conclude that an implied private cause of action exists under Section 602 of Title VI.

V.

Disparate Impact on the Basis of National Origin

Having determined that Appellees were not barred procedurally from bringing a Title VI suit against the Alabama Department of Public Safety, we address the

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reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to 'take affirmative action to overcome the effects of past discrimination.' Our cases makes clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment." *United States v. Fordice*, 505 U.S. 717, 732 n. 7 (1992) (citations omitted). Although the footnote references agency regulations, the discrimination involved in *Fordice* centered on intentional discrimination in college education and not disparate impact discrimination. While not altogether clear, we believe the footnote merely confirms that a Title VI suit, based on the statute alone, must prove intentional discrimination similar to an Equal Protection claim. Nor are we persuaded that the Supreme Court would have overruled *Guardians* without *any* discussion of its precedent and in so oblique a manner as suggested by Appellants.

merits of the case. Appellees' suit lies strictly under a disparate *impact* theory of liability. In prior cases, our circuit has applied explicitly Title VII's disparate impact framework to Title VI disparate impact suits. *See Elston*, 997 F.2d 1407 & n. 14; *Georgia State*, 775 F.2d at 1417.

Under the Title VI disparate impact framework, plaintiffs are required to prove "by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI." *Elston*, 997 F.2d at 1407. Once a prima facie showing is made, a defendant must prove that a "substantial legitimate justification" exists for the challenged practice. *Id.* If a defendant meets this burden, a plaintiff still may prevail by demonstrating that a "comparably effective alternative practice which would result in less disproportionality" exists, or that the "defendant's proffered justification is a pretext for discrimination." *Id. See Georgia State*, 775 F.2d at 1417. We apply this framework to the district court's findings of fact and conclusions of law.

In a detailed order, the trial court marshaled an array of evidence to support its conclusion that the English-only driver's license exam policy, although a facially neutral classification, exerted a disparate impact on the basis of national origin. Appellants, in fact, do not contest any of the district court's findings of fact – either as to the disparate impact of the policy on non-English speaking license applicants or the pretextual nature of the policy justifications offered by the State. Instead, Appellants challenge only the district court's conclusions of law. Specifically, Appellants argue that an English language policy, even if exerting a disparate impact on the basis of

national origin, cannot ever constitute national origin discrimination. We conclude otherwise.

The district court's findings of fact establish that the English language policy for driver's license exams has a statewide disparate impact on Alabama residents of foreign descent. To prove disparate impact, a plaintiff must demonstrate three essential elements: first, a facially neutral policy casts an effect on a statutorily-protected group; second, the effect is adverse; and finally, the effect is disproportionate. *See Elston*, 997 F.2d at 1407. The district court's factual findings satisfy each of these three elements. In the course of the bench trial, the district court heard substantial evidence relating to the history, implementation, and effect of Appellants' English-only exam policy. *Sandoval*, 7 F. Supp.2d at 1291-95. On the basis of this evidence, the court made three central findings. First, it concluded that as many as 13,000 Alabama residents cannot obtain driver's licenses as a result of the English-only test requirement. *See id.* at 1282. Appellants do not dispute that the inability to drive a car adversely affects individuals in the form of lost economic opportunities, social services, and other quality of life pursuits. Second, the district court found that of "all [the] legal residents of the State of Alabama who are otherwise qualified to obtain a Class D private vehicle driver's license but cannot do so becaus they are not sufficiently fluent in English, . . . *[a] vast majority . . . are from a country of origin other than the United States.*"[25] *Sandoval*, 7 F. Supp.2d at

[25] This result should not be surprising in light of statistics correlating language with national origin cited by the district court. *See Sandoval*, 7 F. Supp.2d at 1282. Of those who speak

1283 (emphasis added). Third, the court determined that while no reasonable accommodations were made for non-English speaking applicants, other applicant groups, such as disabled and deaf drivers, received substantial assistance in taking the driving exam. *See id.* at 1287-90. Notably, the Department also made special test accommodations for illiterate English speakers who, just like non-English speakers of foreign descent, cannot proficiently read highway signs in English. The court also found that licensed drivers from other states and countries were able to obtain an Alabama driver's license without having to take the Department's written exam – irrespective of their fluency in the English language. These factual findings demonstrate that Appellants' policy significantly impacts Alabama residents of foreign descent, in both an adverse and disproportionate manner. On appeal, Appellants do not dispute the adverse, disparate impact their English-only policy visits on Alabama residents of foreign descent.

Nevertheless, Appellants contend, as a matter of law, that a discriminatory language policy cannot constitute a disparate impact based on national origin. Their argument rests on a single premise: language never has been

Spanish in the United States, 97% are Hispanic. *See id.* The court also cited the testimony of researcher of [sic] Edward Chen showing that "the correlation between language and national origin is also very high." As of 1989, 72.5% of Chinese Americans speak a language other than English at home. Comparable figures for other Asian Pacific Islander groups exists [sic] for Cambodians (81.9%), Vietnamese (80.7%), Laotians (77.4%), Thai (72.5%), Koreans (69.7%), Filipinos (59.9%), Indians (55.3%), and Japanese (40.5%). *See Sandoval*, 7 F. Supp.2d at 1282.

held to be a proxy for national origin for purposes of proving intentional discrimination. This argument is misplaced. Appellees' Title VI claim does not require a showing of intentional discrimination on the part of Appellants. Indeed, Appellees do not argue now that Appellants' driver's license policy masked discriminatory animus or acted as a proxy for such animus. Appellees' Title VI claim does not implicate the Equal Protection Clause or Section 601 of Title VI, but instead concerns the disparate *impact* provisions of Section 602 of Title VI. While existent case law is unclear as to whether language may serve as a proxy for *intentional* national origin discrimination claims of either a constitutional or statutory nature,[26] this question is tangential to disparate *impact* analysis.

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[26] The Supreme Court never has held that language may serve as a proxy for national origin for equal protection analysis. However, in the context of jury selection, the Court surmised that "it may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." *Hernandez v. New York*, 500 U.S. 352, 371-72 (1991). It also has observed the close nexus between language and national origin in other dicta. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92-93 & n. 5 (1973) (noting that while there was no evidence of national origin discrimination, there also was "no suggestion, for example, that the company refused to hire aliens of Mexican or Spanish-speaking background while hiring those of other national origins"); *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (observing that "the Constitution protects . . . [the Japanese] as well as those who speak another tongue"). Our circuit also has reached this conclusion in dicta in two prior cases. *See United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 553 (5th Cir. 1980) (stating that "the Fourteenth Amendment clearly extends to protection of any group of persons invidiously discriminated against by state law including groups identifiable by ethnic, national origin, or *linguistic characteristics*") (emphasis added); *Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (noting that "to a person who speaks only one tongue or has difficulty using another language than the one spoken in his own home, language might well be an immutable characteristic like skin color, sex, or place of birth"). Several other federal circuits have drawn similar conclusions about the connection between language and national origin. *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 43 (1997) (finding that "since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups, or more generally, conceal nativist sentiment"); *Carino v. University of Oklahoma Bd. of Regents*, 750 F.2d 815, 818-19 (10th Cir. 1984) (finding that employment termination, because of foreign accent, constituted national origin discrimination); *Berke v. Ohio Dep't of Pub. Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) (per curiam) (determining that refusal to hire based on foreign accent amounted to Title VII discrimination on the basis of national origin). We refrain from reaching this question since this case does not involve either a statutory or constitutional claim concerning *intentional* discrimination.

Our circuit unambiguously has held that disparate impact suits under Section 602 involve no intent requirement. *See Belle Glade*, 178 F.3d at 1201-03 (citing *Elston*, 997 F.2d at 1407; *Georgia State*, 775 F.2d at 1417); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (explaining that Title VII disparate impact suits are directed at the "consequences of employment practices"). Under this cause of action, unlike a claim arising under Section 601, "a plaintiff may obtain injunctive or declaratory relief by showing, among other things, that the challenged action

has a 'disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory.' " *Belle Glade*, 178 F.3d at 1202 (quoting *Elston*, 997 F.2d at 1406) (citing *Alexander*, 469 U.S. at 292-94; *Guardians*, 463 U.S. at 584 n. 2; *Georgia State Conference*, 775 F.2d at 1417). Therefore, whether the English-only driver's license policy acted as a proxy for targeting residents of foreign descent is irrelevant under a Section 602 suit for injunctive relief. Plaintiffs instead must prove that the "facially neutral practice [of requiring English-only driving exams] has a disproportionate adverse effect on a group protected by Title VI [in this case, national origin]." *Elston*, 997 F.2d at 1407 (citing *Georgia State*, 775 F.2d at 1417).

In short, the district court properly applied our circuit's disparate impact standard, and concluded that Appellees had presented a prima facie case of disparate impact on the basis of national origin. Moreover, the district court determined that Appellants' stated justifications for the English-only policy were a pretext. Appellants do not contest this finding. Therefore, we can find no error in the district court's conclusion of law that the English-only policy evinces an unlawful disparate impact based on national origin.

Moreover, as discussed earlier, both Supreme Court precedent and longstanding congressional provisions and federal agency regulations have repeatedly instructed state entities for decades that a nexus exists between language and national origin. In *Lau*, a school district, that received federal funds, was adjudged liable under

Title VI disparate impact regulations for an English language policy that adversely affected non-English-speaking Chinese students. *See Lau*, 414 U.S. at 567-68. In ordering the district to take "affirmative steps" to rectify the policy's effects on "national origin-minority group children," the Supreme Court explicitly struck down the policy as unlawful national origin discrimination under Title VI. *See id.* Shortly after *Lau*, Congress ratified the *Lau* holding in its Education Amendments of 1974. There, Congress explained:

> [T]he Federal government, as exemplified by Title VI of the Civil Rights Act of 1964, . . . has a special and continuing obligation to ensure that States and local school districts take appropriate action to provide equal educational opportunities to children and youth of limited English proficiency.

20 U.S.C. § 7402(a)(15). The Department of Justice then issued Title VI implementing regulations for all executive agencies, requiring grant recipients to provide foreign language assistance,

> [w]here a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program. . . . This requirement applies with regard to written material of the type which is ordinarily distributed to the public.

28 C.F.R. § 42.405(d)(1) (1976). Both the Departments of Education and Health and Human Services also have

connected language and national origin. *See* 24 C.F.R. Part 100, App. B. at IV. L & M, V.D., VI.B. (Department of Education) (instructing federal fund recipients to accommodate students with limited English proficiency in order to avoid unlawful national origin discrimination under Title VI); 45 Fed. Reg. 82,972 (1980) (Office of Civil Rights of the Department of Health and Human Services) (concluding that grant recipients "have an obligation under Title VI to communicate effectively with persons of limited English proficiency"). Finally, since 1980, the Equal Employment Opportunity Commission has warned state entities that English-only rules constrain "opportunities on the basis of national origin" and that the implementation of such rules constitutes a prima facie case of national origin discrimination. 29 C.F.R. § 1606.7(a).[27] These agency regulations in concert with *Lau* reinforce the district court's conclusion of law that Appellants' English-only policy violates Title VI by creating an adverse, disproportionate impact on non-English speaking Alabama residents who wish to obtain a driver's license.

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[27] Because the Equal Employment Opportunity Commission is the administrative agency in charge of enforcing Title VII, its Title VII interpretations long have been accorded substantial deference. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (citing *Griggs*, 401 U.S. at 433-34). *But see Spun Steak*, 998 F.2d at 1498-1500 (rejecting the EEOC's English-only guideline). Our circuit has adopted Title VII case law in its Title VI disparate impact jurisprudence. *See Elston*, 997 F.2d at 1407 n. 14; *Georgia State*, 775 F.2d at 1417.

VI.

In sum, we hold that Appellees' suit is not barred under the Eleventh Amendment, that Section 602 of Title VI creates an implied private cause of action to obtain injunctive and declaratory relief under federal regulations prohibiting disparate impact discrimination against statutorily protected groups, and that the district court did not err in deciding, on the merits, that the Appellants' English-only official policy constituted a disparate impact on the basis of national origin. Accordingly, we AFFIRM the district court order granting injunctive relief to Appellees.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	CIVIL ACTION NO. 96-D-1875-N
v.	)	
L.N. HAGAN, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,	)	
Defendants.	)	

MEMORANDUM OPINION, JUDGMENT, DECLARATION, ORDER AND PERMANENT INJUNCTION

(Filed Jun. 3, 1998)

I. INTRODUCTION[1]

Like forty-eight other states and the District of Columbia, the State of Alabama has historically administered the written portion of its Class D driver's license examination in a multitude of foreign languages. From at least the 1970's until 1991, Alabama's Department of Public Safety (the "Department") administered thousands of

[1] Citations for quotations in the Introduction portion of this Memorandum Opinion are provided in the court's Discussion section, Part III, below.

written examinations in at least fourteen languages other than English. Former Alabama State Trooper, Lieutenant Colonel Harold Hammond, Chief of the Department's Driver's License Division from 1978 to 1987 and second-in-command of the entire Department from 1987 to 1991, testified that there were no significant problems in administering the examination. There was no evidence that non-English speakers were more likely to cheat. Translations of the English examination were obtained at no cost to the Department. There was no evidence that non-English speakers posed a greater safety risk or had more accidents than other motorists. Although some examiners complained that foreign language examinations were time consuming, the Department provided, and still provides, special accommodations to handicapped applicants, to illiterate applicants by administering oral or audio-taped examinations, and to deaf applicants by administering Sign Language videotaped examinations. Colonel Hammond never considered curtailing or ending foreign language examinations and in fact expanded the program whenever demand was great enough. When asked if he knew of any reason why the State should not continue providing foreign language examinations, he answered "no."

In 1990, the Alabama legislature ratified Amendment 509 to the Alabama Constitution. The Amendment designates English as the "official language of the State of Alabama" and requires state officials to take "all steps necessary to ensure that the role of English as the common language of the state of Alabama is preserved and enhanced." Approximately one year later, because of Amendment 509, the Department adopted its "English-

Only Policy," requiring all portions of the examination process, including the written examination, to be administered in English only. Interpreters, translation dictionaries and other interpretive aids were officially forbidden. In practice, however, many of the Driver's License Divisions's branch offices still allow applicants to utilize interpreters for some portions of the examination process, and routinely allow the use of translation dictionaries for the written examination. In addition, the evidence before the court shows that Alabama provides special accommodations during the driver's examination process for illiterate applicants, and handicapped applicants, including those that are deaf. Alabama also permits non-English speaking drivers from other states and foreign countries to drive in Alabama if they have a valid license, and, upon moving to Alabama, allows these driver's [sic] to exchange their out-of-state license for an Alabama license without requiring them to take the Department's driving examination. Despite providing special accommodations for all of these categories of drivers, Alabama provides no accommodations for its non-English speaking residents.

Eight months *after* the implementation of the Department's English-only policy, the Department requested an opinion from Alabama's Attorney General regarding —"whether Amendment No. 509 . . . prohibits the Department from giving driver license tests in any language other than English." Although the request was signed by the Director of the Department, it was actually written by Mr. Jack Curtis, the Department's General Counsel and an Assistant Attorney General. When the Attorney General's office received the request for an opinion, the

project was assigned to Mr. Curtis. In other words, Mr. Curtis, in his capacities as an Assistant Attorney General and General Counsel of the Department, both drafted the request for an opinion and wrote the Opinion itself.

The Attorney General concluded that Amendment 509 required all applicants for driver's licenses to take the examination in English. Although the Attorney General's Opinion acknowledged that the Department's English-Only Policy "might be a violation of Title VI of the Civil Rights Act of 1964, or the Equal Protection Clause of the Fourteenth Amendment, consideration of safety and integrity of the licensing process would, [in the words of the Opinion], support a requirement that driver licensing examinations be given in English ." "Safety and integrity" were provided as rationales for the policy without there being *any* evidence that non-English speakers were a higher safety risk or that non-English speakers compromised examination integrity more than English speakers.

High ranking officials within the Attorney General's office disagreed with the Opinion, noting that Alabama utilizes "international highway signs and shapes. Therefore safety is not such an issue. . . . Some accommodation needs to be made." Another high ranking official said of the policy – "it is dumb." Nevertheless, the Attorney General signed the Opinion.

This action was initiated on December 31, 1996, when the Plaintiff, Martha Sandoval, filed a class action Complaint seeking relief from Alabama's practice of administering its driver's license examination in English only. Both the Alabama Department Of Public Safety and L.N. Hagan, in his official capacity as the Director of the

Department, were named as Defendants. Ms. Sandoval contends that "[t]he defendants' refusal to administer the examination in languages other than English or to allow for the use of translators or interpretive aids discriminates against the plaintiff and others similarly situated on the basis of national origin." (Pls.' Compl. at 1.) Ms. Sandoval's Complaint was brought pursuant to 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, et seq.), and its implementing regulations. She seeks a declaration that Alabama's English-Only driver's license rules are unconstitutional and unlawful, as well as a permanent injunction requiring the Defendants, and all those acting in concert with them, to cease their allegedly unconstitutional and unlawful practices.[2]

On May 6, 1997, Ms. Sandoval filed a Motion For Class Certification, which the Magistrate Judge recommended be granted on September 3, 1997. No objections were filed to the Magistrate Judge's Recommendation, and in an October 17, 1997 Order, the court adopted the Recommendation, and granted Plaintiffs' Motion For Class Certification. Ms. Sandoval was certified as the representative of "the class of all legal residents of the State of Alabama who are otherwise qualified to obtain a Class D private vehicle driver's license but cannot do so because they are not sufficiently fluent in English."

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[2] The court properly exercises subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343 (civil rights), and 42 U.S.C. § 2000d-7 (Title VI). The Parties do not contest personal jurisdiction or venue.

On October 24, 1997, the Defendants filed a Motion For Summary Judgment ("Defs.' Mot.") and a Memorandum In Support thereof ("Defs.' Mem."). Plaintiffs filed their Opposition To Defendants' Motion For Summary Judgment ("Pls.' Opp'n") on November 25, 1997, to which Defendants filed a Reply ("Defs.' Reply") on December 5, 1997. On December 24, 1997, Plaintiffs filed a Supplement to their Opposition to Defendants' Motion For Summary Judgment ("Pls.' Supp."), to which Defendants filed a Response ("Defs.' Resp.") on January 6, 1998. On February 9, 1998, the Plaintiffs filed their Supplemental Authority Concerning Defendants' Motion For Summary Judgment ("Pls.' Supp. Auth."). On February 11, 1998, the Parties filed joint Pretrial Stipulations ("Joint Stip.").

On February 12, 1998, the court issued its Order On Pretrial Hearing. On the same date, the court issued an Order denying Defendants' Motion For Summary Judgment, but stressed that the denial was "not on the substantive merits of said motion; rather, the court finds that the issues raised are more amenable to disposition after a full legal and factual exploration at trial."

Trial commenced on February 17, 1998. Plaintiffs filed a Supplement To The Record ("Pls.' Supp. To Record") and their Post-Trial Brief ("Pls.' Post-Tr.Br.") on February 24, 1998. Defendants filed a Supplement To The Record ("Defs.' Supp. To Record") and their Post-Trial Brief ("Defs.' Post-Tr.Br.") on February 27, 1998. On March 5, 1998, Plaintiffs filed their Supplemental Post-Trial Brief ("Pls.' Supp. Post-Tr.Br."), to which Defendants filed a Reply ("Defs.' Reply To Pls.' Supp. Post-Tr.Br.") on March

6, 1998. On March 13, 1998, the Defendants filed Additional Authority And Brief Argument Based Thereon ("Defs.' Add. Auth."), to which Plaintiffs filed a Response ("Pls.' Resp. To Defs.' Add. Auth.") on March 23, 1998.

Finally, on March 5, 1998, the Plaintiffs filed a Motion For Leave To Amend The Complaint By Adding A Party ("Pls.' Mot. For Leave To Amend"). Defendants' March 6, 1998 Reply To Plaintiffs' Supplemental Post-Trial Brief also addressed Plaintiffs' Motion For Leave To Amend.

Both at the conclusion of Plaintiffs' case-in-chief, and at the close of trial, the Defendants' [sic] moved for a judgment as a matter of law. The court took these motions under advisement, and now issues this Memorandum Opinion.[3] After a careful and thorough review of the arguments of counsel, relevant law, the trial of this matter, and the record as a whole, the court finds that for the reasons set forth below, Plaintiffs' Motion For Leave To Amend is due to be granted and that Plaintiffs should prevail on their Title VI disparate impact claim and are thus entitled to their requested relief.[4] The court will

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[3] The court will utilize all substantive pleadings submitted throughout this action as well as the evidence adduced at trial in formulating its findings of fact and conclusions of law.

[4] At trial, the court granted the Defendants' motion for judgment as a matter of law on Plaintiffs' intentional discrimination claims. This Memorandum Opinion addresses Plaintiffs' contention that Defendants' actions violate regulations enacted pursuant to Title VI of the Civil Rights Act of 1964. Because the court finds that Plaintiffs are entitled to their requested relief, the court finds that Defendants' motion for judgment as a matter of law on Plaintiffs' Title VI claim is due to be denied.

enter the appropriate judgment and declaration, will permanently enjoin enforcement of the Department's English-Only Policy, and will direct the Defendants, in conjunction with the Plaintiffs, to formulate revised policies and practices for foreign language examinations that comply with the requirements of Title VI of the Civil Rights Act of 1964.

II. STANDARD OF REVIEW FOR BENCH TRIALS, AND THE GRANTING OF PERMANENT INJUNCTIVE RELIEF[5]

A. Bench Trials

The burden of proof in civil cases is the same regardless of whether the finder of fact is a judge in a bench trial or a jury. *Cabrera v. Jakabovitz*, 24 F.3d 372, 380 (2d Cir. 1994). That is, a plaintiff bears the burden of satisfying the finder of fact that he or she has proven every element of his or her claim by a preponderance of the evidence. A preponderance of the evidence means such evidence as, when considered with that opposed to it, has more convincing force, and demonstrates that what is sought to be proved "is more likely true than not true." *See Pattern Jury Instructions*, Basic Instruction No. 6.1, U.S. Eleventh Circuit District Judges Association (Civil Cases) (1990).

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[5] The legal elements and standard of review utilized in addressing Plaintiffs' Motion For Leave To Amend and Title VI claims will be outlined in Sections III(A), III(B), and III(C)(1) of this Memorandum Opinion.

In bench trials, the judge serves as the sole fact-finder and, thus, assumes the role of the jury. In this capacity, the judge's function includes weighing the evidence, evaluating the credibility of witnesses, and deciding questions of fact, as well as issues of law. *Childrey v. Bennett*, 997 F.2d 830, 834 (11th Cir. 1993) (holding that "it is the exclusive province of the judge in non-jury trials to assess the credibility of witnesses and to assign weight to their testimony").

Moreover, "a trial judge sitting without a jury is entitled to even greater latitude concerning the admission or exclusion of evidence." *Goodman v. Highlands Ins. Co.*, 607 F.2d 665, 668 (5th Cir. 1979) (citing *Wright v. Southwest Bank*, 554 F.2d 661 (5th Cir. 1977));[6] *see also Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 776 n.5 (11th Cir. 1982) (stating that the court has "broad discretion over the admission of evidence in a bench trial"). Of course, these criteria are applied in the legal context of Title VI.

B. Permanent Injunctive Relief

Rule 65(d) of the Federal Rules of Civil Procedure provides for injunctive relief. Fed. R. Civ. P. 65(d). "Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be

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[6] Decisions of the former Fifth Circuit filed prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." *Id.*

In assessing whether permanent injunctive relief is warranted, the court must determine whether the Plaintiffs have satisfied the following three criteria: (1) violation of the applicable statute or regulatory authority by the Defendants; (2) continuing irreparable injury to the Plaintiffs in the absence of an injunction; and (3) lack of an adequate remedy at law. *See Newman v. State of Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Sierra Club v. U.S. Army Corps of Engineers*, 935 F. Supp. 1556, 1571-72 (S.D. Ala. 1996). If warranted, the scope of injunctive relief should be tailored to address the specific violations of law by the Defendants. *See, e.g., Madsen v. Women's Health Ctr.*, 515 U.S. 753, 762 (1994); *cf. McKusick v. City of Melbourne, Fla.*, 96 F.3d 478, 484 n.5 (11th Cir. 1996).

III. DISCUSSION

A. Motion For Leave To Amend The Complaint

Plaintiffs' March 5, 1998 Motion For Leave To Amend The Complaint By Adding A Third Party seeks to add Defendant Hagan, in his official capacity, as a Defendant for purposes of Plaintiffs' Title VI claim. (Pls.' Mot. For Leave To Amend at 1.) Plaintiffs' [sic] argue that:

> In light of the Defendants' assertion of an Eleventh Amendment defense – a defense that they raised for the first time at trial – Director Hagan

should be added as a defendant in his official capacity for purposes of the Title VI claim as well.

. . .

Because Director Hagan has always been a defendant in this case for purposes of the § 1983 and § 1981 claims, neither he nor the Department of Public Safety will suffer any prejudice from adding him as a defendant for purposes of the Title VI claim. Indeed, it would be inequitable to deny the Plaintiffs leave to add him at this stage of the litigation. In their answer, the Defendants did not claim that the Eleventh Amendment barred an action seeking prospective relief under Title VI and its disparate impact regulations. . . . Nor did the Defendants raise the Eleventh Amendment issue they now seek to litigate in their statement of contentions in the Order on Pretrial Hearing. . . . Although the Defendants' failure to raise the issue earlier does not bar them from doing so now . . . it would be unjust to preclude the Plaintiffs from making what amounts to a technical change in the complaint in light of the Defendants' delay.

(Pls.' Mot. For Leave to Amend at 1-2.)

Defendants respond by asserting, essentially, that Plaintiffs' proposed amendment would be futile because the Eleventh Amendment bars Plaintiffs' Title VI claims.[7]

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[7] The Eleventh Amendment provides that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI.

(Defs.' Reply To Pls.' Post-Tr.Br. at 1-3.) Defendants argue that:

> the amendment is designed to cure a perceived jurisdictional defect, and, if allowed, will result in prejudice to the State. Contrary to Plaintiffs' contention, the change is not merely "technical." Rather, the Eleventh Amendment is and has been jurisdictional. It could have been invoked as a defense to the injunctive claims at any time, even on appeal.

(*Id.* at 3, ¶ 4.)

The decision to grant leave to amend a complaint is within the sole discretion of the district court. Fed. R. Civ. P. 15. Rule 15(a) of the Federal Rules of Civil Procedure, however, limits the court's discretion by mandating that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); *see also Halliburton & Associates v. Henderson, Few & Co.*, 774 F.2d 441 (11th Cir. 1985). Therefore, there must be a substantial reason to deny a motion to amend. *Id.* Substantial reasons justifying a denial include "undue delay, bad faith, dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In this action, Plaintiffs' [sic] seek to amend their Complaint to add Director Hagan, in his official capacity, for purposes of Plaintiffs' Title VI claim. After a thorough review of the arguments of counsel and the record as a whole, the court finds that there has been no "undue delay, bad faith, [or] dilatory motive on the part of the movant." *Id.* Plaintiffs' Motion was filed in response to

Defendants' recently filed Eleventh Amendment assertions. Further, the court finds that by allowing the amendment, neither Director Hagan, nor the Department will be unduly prejudiced. Director Hagan is already a named Defendant for purposes of Plaintiffs' § 1981 and § 1983 claims and has had ample notice of this action. The court also finds that although Defendants correctly assert that the Eleventh Amendment issue is jurisdictional, in this action, it does not operate to bar Plaintiffs' Title VI claims. Plaintiffs' proposed amendment only subjects Director Hagan to the possibility of injunctive relief in his official capacity as Director of the Department of Transportation.

Finally, the court finds that Plaintiffs' amendment will not be futile. It is clear that "[the] Eleventh Amendment does not insulate official capacity defendants from actions seeking prospective injunctive relief." *Lassiter v. Alabama A & M Univ.*, 3 F.3d 1482, 1485 (11th Cir. 1993); *see also Wu v. Thomas*, 863 F.2d 1543, 1549-50 (11th Cir. 1989), *reh'g and reh'g en banc denied* March 8, 1989 ("The eleventh amendment does not . . . bar suits for equitable relief against state officers in their official capacity. . . . "); *see further Cross v. State of Alabama, State Department of Mental Health & Mental Retardation*, 49 F.3d 1490, 1503 (11th Cir. 1995) (noting same). As fully addressed below, the well defined exception to *Ex parte Young*, 209 U.S. 123 (1908), (allowing federal courts to enjoin state officials from conduct violating federal law), applies in this action.[8]

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[8] The court also rejects the Department's contention that *Floyd v. Waiters*, 133 F.3d 786 (11th Cir. 1998) prohibits adding

Additionally, as Plaintiffs note, Rule 21 of the Federal Rules of Civil Procedure allows for any party to be "dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Fed. R. Civ. P. 21. Here, the court finds that adding Director Hagan in his official

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Hagan as a Party-Defendant to this action. (*See* Defs.' Mot. For Leave To Submit Add. Auth. at 3-4.) In *Floyd*, two students sued a school district and several school officials for alleged sexual harassment by a school security guard. *Floyd*, 133 F.3d at 788-89. The Eleventh Circuit found that *assuming* the superintendent and school board were *not* put on notice of the harassment, "the power to bring *monetary liability* onto the [recipient of federal funds under Title IX did not] extend beyond the superintendent and school board to lower employees." *Id.* at 792 (emphasis added) ("If [after being put on notice] the superintendent or school board then does nothing, the school district can be liable"). It is sufficient for the court to note that in this action, Plaintiffs are not complaining of discriminatory conduct by one "lower employee," but are seeking the cessation of an allegedly discriminatory policy instituted by the Department headed by Hagan. And, Plaintiffs here are only seeking injunctive relief against the Department and Hagan, in his official capacity, not monetary damages against the Department or Hagan as an individual.

Accordingly, nor does the court find merit in Defendants' reliance on the *Floyd* court's statement that "because the contracting party is the grant-receiving local school district, a 'Title IX claim can only be brought against a grant recipient [– that is, a local school district –] and not an individual. *Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014, 1019 (7th Cir. 1997); *see also Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012-13 (5th Cir. 1996)." *Id.* at 789. As Plaintiffs note, the portion of the *Smith* case quoted by the *Floyd* court pertained to individual capacity liability, not official capacity liability for claims seeking injunctive relief only. *See Smith*, 128 F.3d at 1020-21; *see also* Pls.' Resp. To Defs.' March 13 Submission at 5.

capacity meets the interests of justice by curing any perceived or actual jurisdictional defect, thus meeting the remedial goals of Plaintiffs' suit.

Based on the foregoing, the court finds that Plaintiffs' Motion For Leave To Amend Complaint seeking to add Director Hagan, in his official capacity, as a Defendant for the purposes of Plaintiffs' Title VI claim, is due to be granted.

B. Application Of Title VI

Title VI of the Civil Rights Act of 1964 is an exercise of Congress' Spending Clause power[9] and prohibits discrimination on the basis of "race, color or national origin . . . under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.[10] As will be

[9] *See Guardians Assoc. v. Civil Service Comm'n of New York City*, 463 U.S. 582, 598-99 (1983); *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974); *Davis v. Monroe County Board of Education*, 120 F.3d 1390, 1398 (11th Cir. 1997) ("In [*Guardians*], at least six members of the Supreme Court agreed that Title VI was enacted under the Spending Clause"), *id.* at 1399 (finding "Title IX, like Title VI, was enacted under Congress' power to spend for the general welfare of the United States"). *See also* U.S. Const., art. I, § 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ").

[10] 42 U.S.C. § 2000d provides in full:

> **Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.**
>
> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

explored below, the statute has been amended twice. First, in the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title VI. Then, Congress passed the Civil Rights Restoration Act of 1987, Pub.L. 100-259, 102 Stat. 28, broadening the coverage of the anti-discrimination provisions of Title VI.

Title VI itself bars only intentional discrimination. *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardians Assn. v. Civil Service Comm'n of New York City*, 463 U.S. 582, 607-08, 612, 634 (1983). However, federal Departments and Agencies have promulgated rules and regulations, pursuant to Title VI, prohibiting practices leading to an unjustified disparate impact. 42 U.S.C. § 2000d-1 provides for the implementation of rules and regulations in furtherance of the express provisions and purposes of Title VI:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1. The Supreme Court has held that the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on protected groups even if those actions are not intentionally discriminatory. *Alexander*, 469 U.S. at 292-94; *see also Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1406 (11th Cir. 1993); *Georgia State Conference of Branches of NAACP v. State of Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). In other words, the promulgation of regulations incorporating a disparate impact standard is a valid exercise of agency authority.[11] *See Alexander*, 469 U.S. at 292-94. As explained by Justice Marshall in *Alexander*:

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[11] The court also notes that "when Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.' " *ABF Freight System, Inc. v. National Labor Relations Board*, 510 U.S. 317, 324 (1994) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)); *see also Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1257 (D.C.Cir. 1980) ("Deference to the agency's interpretation is particularly appropriate where, as here, the statute specifically requires the agency to develop implementing regulations."). In fact, "the validity of a regulation promulgated under a general authorization provision such as § 602 of Tit. VI [§ 2000d-1] 'will be sustained so long as it is reasonably related to the purposes of the enabling legislation.' " *Lau v. Nichols*, 414 U.S. 563, 571 (1974) (White, J., concurring) (citing *Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268, 280-81 (1969)).

The court finds that the disparate impact regulations at issue here are reasonably related to the purposes of the enabling legislation, and are neither arbitrary, capricious, nor manifestly contrary to the statute.

> [*Guardians*] held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. . . . In essence, then, we held [in *Guardians*] that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

469 U.S. at 293-94. *See also New York Urban League, Inc. v. State of New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) ("Title VI delegated to federal agencies the authority to promulgate regulations incorporating a disparate impact standard"). Plaintiffs' claims in this lawsuit are brought solely pursuant to disparate impact regulations enacted pursuant to § 2000d-1, and not the text of Title VI itself (§ 2000d).

This suit raises many interesting questions of law and fact, including whether discrimination on the basis of language can lead to an unjustified disparate impact in violation of Title VI: Plaintiffs argue that in this case, discrimination based on language results in an unjustified disparate impact on the basis of national origin. Before addressing that question, however, the threshold issues for the court's resolution are: (1) whether the Department is subject to the provisions of Title VI as a recipient of federal funds;[12] (2) if so, whether the

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[12] In other words, are any federal funds being transferred via grant, loan or contract to a state program or activity? *See* 42 U.S.C. § 2000d.

regulations enacted pursuant to Title VI (§ 2000d-1) allow for private rights of action; (3) if so, whether the Plaintiffs at bar have the requisite standing to bring this action; and finally (4) whether the Eleventh Amendment bars Plaintiffs' suit.

As discussed below, the court finds that: (1) the Department is a recipient of federal funds within the meaning of Title VI; (2) the regulations enacted pursuant to Title VI allow for private rights of action; (3) Plaintiffs have the requisite standing to bring suit; and (4) the Eleventh Amendment does not bar Plaintiffs' claims. Having so found, the court then turns to the consideration and analysis of the Department's English-Only policy, ultimately concluding that it violates disparate impact regulations enacted pursuant to § 2000d-1.

1. The Department is a recipient of federal funds within the meaning of Title VI

Defendants concede that the Department receives millions of dollars in federal funds every year.[13]

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[13] Defendants so stipulated at trial. *See also*, Pls.' Trial Ex. 24 (Department of Public Safety's 1997-1998 Operations Plan indicating receipt of several million dollars in federal funds); *Id.*, Ex. 25 (Department's Federal Grant's Summary for October 1, 1995 through September 30, 1996); *Id.*, Ex. 26 (July 1995 grant agreement between the Federal Department of Transportation's Federal Highway Administration and the Department); *Id.*, Ex. 27 (1996 Department application for federal grant); Defs.' Mem. at 11; Defs.' Mem., Ex. I; Defs.' Reply at 14 (admitting that the Department receives federal grants).

Accordingly, the court finds – based on Defendants stipulation at trial and the evidence in the record – that the

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In the 1995-1996 fiscal year, the Department received approximately $3.5 million in federal funds through several federal grants. *See* Ex. 26 (Public Safety Federal Grant Summary). In the 1997-1998 fiscal year, the Department expects to receive an even greater amount. *See* Ex. 24 (DPS Budget). Most of this federal grant money comes from the Department of Transportation and the Department of Justice. (*See* Defs.' Tr. Stip.; Pls.' Opp'n, Footnote 30.)

A recipient of federal financial assistance, such as the Department, may not "[p]rovide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program" on the basis of race, color, or national origin. *See* 49 C.F.R. § 21.5(b)(1)(ii) (1997). The complementary disparate impact provision states that:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of person to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program; may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

Id. at § 21.5(b)(2). "Services, financial aid, or other benefits provided under a program receiving Federal financial

Alabama Department of Public Safety, which administers Alabama's driver's license examinations, is the recipient of federal funds within the meaning of Title VI. *See* 42 U.S.C. § 2000d-4a(1)(A).

While Defendants concede that the Department receives federal funds, they argue that "it is not appropriate to hold the Department and Hagan liable where none of the grant funds received are applied to Class D driver's licenses." (Defs.' Post-Tr.Br. at 17; *see also* Defs.' Mem. at 11-13; Defs.' Reply at 14.) In other words, Defendants contend that because none of the federal funds go specifically to the Department's Driver's Licensing Division, the "program or activity" language of Title VI is not implicated.

42 U.S.C. § 2000d-4a, defines "program or activity" and "program" as follows:

> For the purposes of this subchapter, the term "program or activity" and the term "program" mean *all* of the operations of –
>
> **(1)(A)** a department, agency . . . or other instrumentality of a State . . . ; or
>
> **(B)** the entity of such State . . . government that distributes such assistance and each such

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assistance" is defined as "any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance." *Id.* at § 21.5(b)(4). *See also* 28 C.F.R. § 42.104 (1997) (DOJ regulations); *see further* 49 C.F.R. § 21.21(a) (stating that regulations did not supersede any other regulations prohibiting discrimination on grounds of race, color or national origin "in any program or situation to which this part is inapplicable, or [that] prohibit discrimination on any other ground").

> department or agency (and each other State . . . government entity) to which the assistance is extended, in the case of assistance to a State . . . government;
>
> . . . [*or*]
>
> **(4)** any other entity which is established by two or more of the entities described in paragraph (1) . . . ; *any* part of which is extended Federal financial assistance.

42 U.S.C. § 2000d-4a (italics added, bold in original).

It seems clear, based on the language of § 2000d-4a alone, that Defendants' argument that Plaintiffs cannot assert a viable Title VI claim because no federal money directly benefits applicants for Class D driver's licenses is erroneous, as is Defendants' contention that "if Congress or a federal agency wanted Alabama to establish a foreign-language examination program, Congress should . . . make a specific grant." (Defs.' Reply at 15.) "Program or activity" means "all" of the operations of a state department or agency, not just the specific program or activity receiving federal funds. 42 U.S.C. § 2000d-4a. An examination of the legislative history behind § 2000d-4a bolsters this conclusion.

Prior to the Civil Rights Restoration Act of 1987, the term "program or activity" was not defined by Congress. In 1984, the Supreme Court held in *Grove City v. Bell*, 465 U.S. 555 (1984), that Title VI liability was only established when the plaintiff could show discrimination in a particular program or activity that specifically received federal funds. *Id.* at 575-76. Only those programs or activities receiving federal funds were subject to Title VI's prohibitions. So, for example, if a state Department of Public

Safety restricted the use of federal funds to its Driver's License Division's "Problem Driver Pointer System," only that program would be subject to Title VI's regulations. The other non-federally funded programs run by the Driver's License Division would not be subject to Title VI. This, essentially, is Defendants' argument. (Defs.' Reply at 14; Defs.' Mem. at 11.)

Congress disagreed with the Supreme Court's narrow construction of "program or activity" and amended Title VI, over President Reagan's veto, by passage of the Civil Rights Restoration Act of 1987. (P.L. 100-259, codified in part as 42 U.S.C. § 2000d-4a (1988)). The purpose of the Act was to legislatively overturn *Grove City* and bring Title VI back into line with pre-*Grove City* "judicial and executive branch interpretations and enforcement practices which provide for broad coverage of the anti-discrimination provisions of [Title VI]." S. Rep. No. 100-64, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. Vol. 3 at 3. Accordingly, § 2000d-4a defines "program or activity" as "all" of the operations of a particular entity, not just the specific program receiving federal funds. 42 U.S.C. § 2000d-4a. The legislative history explains how the Act affects the coverage of state and local governments:

> The bill provides that when any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered. If a unit of a state or local government is extended federal aid and distributes such aid to another governmental entity, all of the operations of the entity which distributes the funds and all of the operations of the department or agency to which the funds are distributed are covered.

> Examples: If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations.
>
> If the office of a mayor receives federal financial assistance and distributes it to local departments or agencies, all of the operations of the mayor's office are covered along with the departments or agencies which actually get the aid.

S. Rep. No. 100-64, at 16 (1987), *reprinted in* 1988 U.S.C.C.A.N. Vol. 3 at 18; *see also Id.* at 6 ("the department or agency which receives the aid is covered"). *See further Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 73 (1992) (noting Amendment); *Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991) (noting that statute applied to department or agency but not entire state or local government); *see further Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265, 271 (6th Cir. 1994); *Pfeiffer v. Marion Center Area School District, et al.*, 917 F.2d 779, 783 (3rd Cir. 1990); *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377, 1384 (10th Cir. 1990); *Lussier v. Dugger*, 904 F.2d 661, 664-65 (11th Cir. 1990); *Knight v. State of Alabama*, 787 F. Supp. 1030, 1364 (N.D. Ala. 1991), *affirmed in part, vacated in part on other grounds, and reversed in part on other grounds*, 14 F.3d 1534 (11th Cir. 1994). Apparently, Defendants failed to determine the continuing validity of *Grove City*, or overlooked the plain language of § 2000d-4a.

Based on the foregoing, the court finds that the relevant consideration is whether the Driver's License Division is "part" of "the operations" of one of the entities

listed in § 2000d-4a which "is extended . . . federal financial assistance." Because the Department is the recipient of federal funds, all of its agencies, divisions, and programs, including its Driver's License Division, are subject to the requirements of Title VI, regardless of whether those funds are specifically directed toward its Driver's License Division or programs therein. *See* 42 U.S.C. § 2000d-4a ("program or activity" applies to all of the operations of . . . a department, agency . . . or other instrumentality of a State"); *see also Schroeder*, 927 F.2d at 962 (noting that statute applied to department or agency but not entire state or local government); *Bentley v. Cleveland County Board of County Commissioners*, 41 F.3d 600, 603 (10th Cir. 1994) (distinguishing *Schroeder* by noting that plaintiff – as here – sued "the very parties he claims discriminated against him"); *Elston*, 997 F.2d at 1406 (11th Cir. 1993) (noting that defendant received funds from the United States Department of Education and was therefore subject "not only to the duty of nondiscrimination mandated by Title VI, but also to the duties of nondiscrimination mandated by Department of Education regulations promulgated pursuant to Title VI").

2. The regulations enacted pursuant to Title VI (§ 2000d-1) allow for a private right of action

Defendants next argue that even if the Department is subject to the requirements of Title VI as a recipient of federal funds, "plaintiffs lack . . . a private right of

action."[14] (Defs.' Reply at 14.) In support of their contention that "plaintiffs have no private right of action against the Department for alleged violations of any federal grant," (Defs.' Mem. at 12), Defendants rely on *Suter v. Artist M.*, 503 U.S. 347 (1992) and *Blessing v. Freestone*, 117 S.Ct. 1353 (1997). (Defs.' Mem. at 12.) *Suter* and *Blessing*, however, have no direct bearing on the issue of whether the regulations enacted pursuant to § 2000d-1 allow for private causes of action.

To assert a non-constitutional federal claim, litigants must have a statutorily enforceable right. *Suter* and *Blessing* examined certain provisions of the Social Security Act to determine whether private litigants could enforce

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[14] Defendants' pleadings meld their Title VI funding, standing and private right of action arguments. Their reasoning is as follows: (1) the only grant the Department received relating to Class D driver's licenses was from the National Highway Traffic Safety Administration ("NHTSA"); (2) the grant allows Alabama to participate in the Problem Driver Pointer System; (3) the Problem Driver Pointer System does not convey particularized benefits to the Plaintiffs; (4) if the Department were to violate the terms of the grant, which require compliance with Title VI, NHTSA, not the general public should enforce compliance; consequently, (5) Plaintiffs have no private right of action against the Department for violations of a federal grant. (Defs.' Mem. at 11-12.)

As discussed above, Defendants' "specific grants" argument goes to the question of whether the Department is a recipient of federal fund within the meaning of Title VI. The argument that only the NHTSA has the power to enforce compliance goes to the argument of whether Plaintiffs have the requisite standing to bring this action and whether the regulations at issue allow for private rights of action.

those provisions via 42 U.S.C. § 1983. In contrast, here, Plaintiffs assert a private right of action in accordance with regulations enacted pursuant to a particular statute, namely, Title VI. Not only must "each statute . . . be interpreted by its own terms," *Suter*, 503 U.S. at 358 n.8, but the analysis of whether regulations enacted pursuant to a statute allow for private causes of action differs from an analysis of whether statutory provisions are enforceable via § 1983. Accordingly, Defendants' reliance on those cases is misplaced.[15]

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[15] Whether a statute allows for a private cause of action is a separate issue from whether that statute may be enforced via § 1983. Although the analysis employed in answering either question may overlap because under either theory a plaintiff must demonstrate Congressional intent to create a right that may be privately enforced, *see Suter*, 112 S. Ct. at 1370; *Polchowski v. Gorris*, 714 F.2d 749, 751 (7th Cir. 1983), each question is analytically distinct. *See Suter*, 112 S. Ct. at 1360 (analyzing each question separately); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (same); *see also Former Special Project Employees Ass'n v. Norfolk*, 909 F.2d 89 (4th Cir. 1990); *Playboy Enters. v. Public Serv. Comm'n*, 906 F.2d 25 (1st Cir. 1990); *Harper v. Federal Land Bank*, 878 F.2d 1172, 1178 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990); *Victorian v. Miller*, 813 F.2d 718 (5th Cir. 1987). Indeed, courts have found a viable § 1983 claim while at the same time concluding that the statute at issue did not afford a private cause of action. *See Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986).

Section 1983 imposes liability on persons who, under color of state law, deprive a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Although § 1983 protects rights conferred by federal statutes, *Maine v. Thiboutot*, 448 U.S. 1 (1980), to seek redress through § 1983, a plaintiff must assert the violation of a federal right, not merely a federal law. *Golden State Transit Corp.*, 493 U.S. 103; *see also Harris v. James*, 127 F.3d 993, 997 (11th Cir. 1997).

Neither Title VI nor the regulations implemented pursuant to § 2000d-1, at issue here, expressly authorize a

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Congress, of course, may explicitly confer a federal right in a particular statute. Otherwise, the Supreme Court has "traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right." *Blessing*, 117 S.Ct. at 1359:

> First, Congress must have intended that the provision in question benefit the plaintiff. *Wright*, 479 U.S. at 430. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. *Id.* at 431-432. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms. *Wilder*, 496 U.S. at 510-11.; *see also Pennhurst*, 451 U.S. at 17 (discussing whether Congress created obligations giving rise to an implied cause of action).

Blessing, 117 S.Ct. at 1359; *see also Harris*, 127 F.3d at 999, 1004 ("the three-prong 'enforceable rights' test . . . remains good law").

If a plaintiff demonstrates that a federal statute creates an individual right, a rebuttable presumption is created that the right is enforceable through § 1983. *Blessing*, 112 S.Ct. at 1360. Dismissal of a claim is proper, therefore, if Congress "specifically foreclosed a remedy under § 1983 . . . [either] expressly by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (*citing Smith v. Robinson*, 468 U.S. 992, 1009, n.9 (1984); *Livadas*, 512 U.S. at 133).

private right of action. It is clear, however, that Title VI itself (§ 2000d) authorizes "an implied private cause of action for victims of the prohibited discrimination." *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) ("we have no doubt that Congress . . . understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination"); *Cone Corp., C.H. v. Florida Dept. of Transportation*, 921 F.2d 1190, 1201 n.37 (11th Cir. 1991) (finding that Title VI (§ 2000d) authorized

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In both *Suter* and *Blessing*, the Supreme Court examined whether the Congressional legislation at issue – Title IV-E of the Social Security Act in *Suter* and Title IV-D of the Social Security Act in *Blessing* – authorized private rights of action through § 1983. *Suter* and *Blessing* are among more recent Supreme Court decisions requiring courts to analyze the relevant statutory provisions at issue "in light of the entire legislative enactment, to determine whether the language in question created 'enforceable rights, privileges, or immunities within the meaning of § 1983.' " *Suter*, 503 U.S. at 357 (*quoting Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987)); *see also Blessing*, 117 S.Ct. at 1360; *Livadas v. Bradshaw*, 512 U.S. 107. 133 n.27 (1994); *Wilder*, 496 U.S. at 511-12; *Golden State Transit*, 493 U.S. at 106; *Wright*, 479 U.S. at 430; *see further Farley v. Philadelphia Housing Authority*, 102 F.3d 697, 702 (3d Cir. 1996).

In contrast to *Suter* and *Blessing*, the Plaintiffs in the case at bar are not asserting Title VI rights via § 1983. (Pls.' Opp'n at 32.) Rather, Plaintiffs contend that they have a direct cause of action under Title VI and its implementing regulations. (*Id.*) The court agrees and so finds. Rather than determining whether the regulations promulgated pursuant to § 2000d-1 establish "federal rights" enforceable via § 1983, the specific question to be resolved in this action is whether the regulations enacted pursuant to Title VI, that are at issue here, afford litigants a private cause of action.

private cause of action against the Florida Department of Transportation and its Secretary).

As for Title VI regulations, in the Eleventh Circuit, two cases implicitly support the proposition that private causes of action may be brought pursuant to § 2000d-1 regulations prohibiting policies or practices resulting in an unjustified disparate impact.[16] In *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985), a group of black schoolchildren challenged the policies and practices of the Georgia State Board of Education and a number of local school districts. *Id.* at 1407. The Eleventh Circuit noted that "[t]here is no doubt that the plaintiffs predicated this cause of action on the regulations. As a result, the district court correctly applied disparate impact analyses to their Title VI claims." *Id.* at 1417 (footnote omitted). In *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993), Plaintiffs represented a class of black children and their parents who brought suit against various Talladega County, Alabama, educational entities challenging several actions undertaken in the restructuring of the Talladega County school system. *Id.* at 1400. Plaintiffs claimed that the actions violated Title VI and regulations enacted by the United States Department of Education pursuant to Title VI. *Id.* As quoted above, the *Elston* court noted: "While Title VI itself, like the Fourteenth Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even

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[16] Relevant United States Supreme Court jurisprudence is discussed below.

if those actions are not intentionally discriminatory." *Id.* at 1406 (citations omitted).

Like the instant action, *Georgia State Conference* and *Elston* involved private litigants bringing suit pursuant to § 2000d-1 regulations alleging disparate impact. In neither case did the Eleventh Circuit address the propriety of private causes of action brought pursuant to § 2000d-1 regulations and instead proceeded to address the merits of the respective plaintiffs' allegations. Accordingly, both cases implicitly support the proposition that private causes of action may be brought under regulations enacted pursuant to § 2000d-1.

Additionally, two recent Eleventh Circuit cases support the proposition that federal rights may be created by valid regulations that merely "further define" or "flesh out" the content of a statutory right. In *Harris*, although addressing an action brought pursuant to § 1983, the Eleventh Circuit noted that:

> *Wright*[17] would seem to indicate that so long as the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute – "in conjunction with the regulation" – may create a federal right *as further defined by the regulation.*"

Harris, 127 F.3d at 1008-09 (emphasis added). Although the *Harris* court explicitly did not "define the precise role which a valid regulation may play in the 'federal rights' analysis," *Id.* at 1008, in *Doe v. Chiles*, 136 F.3d 709, 717

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[17] *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987).

(11th Cir. 1998), the Eleventh Circuit cited *Harris'* observation regarding *Wright* and utilized the "in conjunction" reasoning to find that the Medicaid regulations at issue there "further define[d] the contours of the statutory right." *Doe*, 136 F.3d at 717. The court concluded that the statute "as further fleshed out by [the] regulations – creates a federal right." *Id.*

Doe and *Harris* indicate that a federal regulatory right may be established if it can be shown that: (1) the enabling statute conferred a specific right and (2) a valid regulation merely further defines or fleshes out the content of that right. *Doe*, 136 F.3d at 717; *Harris*, 127 F.3d at 1008-09. If so, "then the statute – 'in conjunction with the regulation' – may create a federal right as further defined by the regulation." *Harris*, 127 F.3d at 1009; *Doe*, 136 F.3d at 717 (quoting *Harris*).

Here, it is clear that Title VI prohibits discrimination in programs that receive federal funds, and confers "an implied private cause of action for victims of the prohibited discrimination." *Cannon*, 441 U.S. at 703; *Cone*, 921 F.2d at 1201 n.37. Therefore, the question becomes whether the disparate impact regulations "merely define or flesh out" the content of Title VI's statutory right to be free from discrimination in federally funded programs such that the court may conclude that "the statute – in conjunction with the regulation – may create a federal right as further defined by the regulation." The court concludes that they do, and, accordingly, that it can.

Title VI itself prohibits discrimination based on race, color or national origin in programs or activities receiving federal funds. 42 U.S.C. § 2000d. Although the statute is

silent as to the scienter required for statutory violations, the Supreme Court has held that the statute itself only prohibits intentional discrimination. *Alexander*, 469 U.S. at 293. Nevertheless, section 2000d-1 provides that agencies may enact regulations "to effectuate the provisions of section 2000d . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute." 42 U.S.C. § 2000d-1. Regulations that prohibit an unjustified disparate impact in federally funded programs are valid exercises of agency authority. *Alexander*, 469 U.S. at 292-294; *Elston*, 997 F.2d at 1406. It cannot be disputed that prohibiting actions having an unjustified disparate impact "effectuate[s] the provisions of section 2000d [and is] consistent with achievement of the objectives of the statute." 42 U.S.C. § 2000d-1. The regulations merely define the contour of and flesh out the statutory right to be free from discrimination in federally funded programs. *See also Lau v. Nichols*, 414 U.S. 563, 566 (1974) (where the Supreme Court based its reasoning on disparate impact regulations enacted pursuant to § 2000d-1, but based its holding solely on the statute (§ 2000d)).

Finally, Title VI itself authorizes "an implied private cause of action for victims of the prohibited discrimination." *Cannon*, 441 U.S. at 703; *Cone Corp.*, 921 F.2d at 1201 n.37. Because disparate impact regulations are valid exercises of agency authority, *Alexander*, 469 U.S. at 292-294; *Elston*, 997 F.2d at 1406, there is no principled reason to deny an implied private right of action under regulations effectuating the provisions of a statute containing an implied private right of action.

Consequently, the court can conclude that "the statute – 'in conjunction with the regulation' – [ ] creates a federal right as further defined by the regulation." *Doe*, 136 F.3d at 717 (citing *Harris*, 127 F.3d at 1008-09). Valid regulations enacted pursuant to § 2000d-1 that effectuate the purposes of Title VI, allow for private causes of action against entities operating federally funded programs or activities, (as expansively defined in § 2000d-4), that work an unjustified disparate impact against those protected by Title VI.

Even if *Elston* and *Georgia State Conference* do not lead to the conclusion that § 2000d-1 regulations afford a private right of action, and even if *Doe* and *Harris* do not lead to the conclusion that the statute – in conjunction with the regulations – create a privately enforceable federal right as further fleshed out by the regulations, the court still finds that under an analysis of the text, legislative history and purpose of Title VI, private causes of action may be brought pursuant to § 2000d-1 regulations prohibiting an unjustified disparate impact. The court's finding is supported by the findings of other federal courts. *See Chester Residents Concerned For Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *petition for cert. filed* March 30, 1998 (No. 97-1620); *Cureton v. NCAA*, 1997 WL 634376, *2 (E.D.Pa. Oct. 9, 1997) (finding private right of action in Title VI regulations); *Association of Mexican-American Educators v. State of California*, 836 F. Supp. 1534, 1548 (N.D. Cal. 1993) (same); *see also New York Urban League, Inc. v. State of New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (evaluating merits of disparate impact claim under regulations).

The only Circuit Court of Appeals to explicitly address the question of whether a private right of action exists under disparate impact regulations promulgated by a federal administrative agency pursuant to § 2000d-1 is the Third Circuit. After an exhaustive review of applicable case law, the Third Circuit held that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 [§ 2000d-1] of Title VI of the Civil Rights Act of 1964." *Chester Residents Concerned For Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *petition for cert. filed* March 30, 1998 (No. 97-1620). In so finding, the Third Circuit noted that the decisions of eight other Courts of Appeals supported its finding. *Id.* at 936. Among those cases cited were the Eleventh Circuit's decisions in *Elston* and *Georgia State Conference*. *Seif*, 132 F.3d at 936.

In its meticulous opinion, the Third Circuit first examined applicable Supreme Court precedent: *Alexander*, 469 U.S. at 287, and *Guardians*, 463 U.S. at 582. *See Seif*, 132 F.3d at 931-932. The Third Circuit found in *Guardians* "an implicit approval by five Justices of the existence of a private right of action under discriminatory effect regulations implementing section 602 of Title VI." *Seif*, 132 F.3d at 930. The court "hesitate[d], however, to hold that *Guardians* is dispositive of [whether regulations enacted pursuant to § 2000d-1 afford a private cause of action] because the Court did not directly address the issue now before us." *Seif*, 132 F.3d at 930.

The court then examined *Alexander*, and noted that although there was some merit to the argument that:

> *Alexander* . . . implicitly confirms that *Guardians* recognized the existence of a private right of action. . . . The Court in *Alexander* spoke in the passive voice – "could make actionable" – and did not indicate whether *Guardians* stood for the proposition that a private plaintiff, or the relevant agency, could proceed under a disparate impact standard. . . . [This argument] requires the inference that because *Alexander* was a suit brought by private plaintiffs, and because *Guardians* was also brought by private plaintiffs, the *Alexander* Court must have been speaking of private plaintiffs when it used the passive voice. This inference from *Guardians* may be justified, but we find no direct authority in *Alexander* that either confirms or denies the existence of a private right of action.

Seif, 132 F.3d at 931. Consequently, the court declined to hold that "a private right of action exists based on *Guardians* and *Alexander* alone."[18] *Id.*

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[18] In addition to *Guardians* and *Alexander*, the Supreme Court's decision in *Lau*, 414 U.S. at 563 is instructive. There, the Supreme Court found language discrimination to be violative of Title VI. In so doing, the Court implicitly approved of an implied private right of action pursuant to disparate impact regulations. The plaintiffs in *Lau* were a group of non-English-speaking Chinese students who sued a San Francisco school district alleging violations of disparate impact regulations enacted by the federal Department of Health, Education and Welfare. After noting that: (1) § 2000d-1 authorized agencies to promulgate regulations; (2) that "the Federal Government has the power to fix the terms on which its money allotments to the States shall be disbursed," *Id.* at 570; and that (3) the school district "contractually agreed" to comply with Title VI, the court found for plaintiffs, resting "solely on § 601 [§ 2000d], to reverse the Court of Appeals." *Id.* at 566.

The court then turned to relevant Third Circuit precedent to determine whether regulations enacted pursuant to § 2000d-1 allowed for a private cause of action, and determined that "our own precedent does not resolve the matter."[19] *Id.* at 933. Finally, the Third Circuit utilized a three-prong test to determine whether the court could imply a private right of action from the § 2000d-1 regulations. *Id.* The test required the court to inquire:

> (1) whether the agency rule is properly within the scope of the enabling statute; (2) whether the statute under which the rule was promulgated properly permits the implication of a private right of action; and (3) whether implying a private right of action will further the purpose of the enabling statute.

Seif, 132 F.3d at 933 (quotations and citations omitted).

The Eleventh Circuit has not specifically articulated the proper analysis for determining whether a private right of action may be inferred from regulations enacted by a federal department or agency pursuant to an express grant of authority to do so by Congress. The Eleventh Circuit has, however, articulated the test for whether a private right of action may be inferred from a statute. *Bok v. Mutual Assur., Inc.*, 119 F.3d 927, 928 (11th Cir. 1997); *Baggett v. First Nat. Bank of Gainesville*, 117 F.3d 1342, 1351 (11th Cir. 1997); *Dime Coal Co., Inc. v. Combs*, 796 F.2d 394, 397 (11th Cir. 1986). That test is derived from the Supreme Court's formulation in *Cort v. Ash*, 422 U.S. 66 (1975). In *Cort*, the following factors were relevant in

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[19] The court has discussed relevant Eleventh Circuit precedent above.

determining whether to imply a right of action in a statute:

> (1) whether the plaintiff is a member of the class for whose "especial benefit" the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based on federal law.

Cort, 422 U.S. at 78. The Supreme Court has since held that these factors are not entitled to equal weight, and that the central inquiry must focus on the question of legislative intent. *Thompson v. Thompson*, 484 U.S. 174, 179-80 (1988); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979). In this action, the fourth factor is irrelevant because Title VI is federal law. *See Lowrey v. Texas A & M University System*, 117 F.3d 242, 250, n.11 (5th Cir. 1997).

The court finds that for the purpose of evaluating whether regulations enacted pursuant to a statute afford a private right of action, the Third Circuit's three-prong test for evaluating regulations, articulated above, comports with the sum and substance of the Eleventh Circuit's statutory test. *See Lowrey*, 117 F.3d at 250 n.10 (noting different analysis for whether private rights of action may be implied from a statute as opposed to regulations enacted pursuant to a statute). Accordingly, the court will utilize the Third Circuit's three-prong test in analyzing whether the § 2000d-1 regulations allow for a private cause of action, and, in fact, expressly adopts,

and hereby incorporates by reference, the reasoning and findings of the Third Circuit in *Seif*:[20]

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[20] A grant of federal rulemaking power is not authority to create a cause of action or federal jurisdiction. That authority lies solely with Congress. *See Stewart v. Bernstein*, 769 F.2d 1088 (5th Cir. 1985); *Marshall v. Gibson's Prods., Inc. of Plano*, 584 F.2d 668 (5th Cir. 1979). Thus, no implied private right of action can be found from regulations standing alone. Rather, the statute authorizing federal departments or agencies to promulgate rules and regulations must itself be examined to determine if a private right of action can be implied. *See Lowrey*, 117 F.3d at 253 n.20 ("Provided the regulations further the substantive purposes of the enabling act, a private right of action may be implied from the regulations") (citing *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 947 (3d Cir. 1985); *Robertson v. Dean Witter Reynolds*, 749 F.2d 530, 536-37 (9th Cir. 1985)).

As noted, the predominant guide to determining whether a statute implied a private remedy was the four-step test established in *Court*, 422 U.S. at 78. The central inquiry must focus on the question of legislative intent. *Thompson v. Thompson*, 484 U.S. 174, 179-80 (1988); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979). Where an examination of one of the *Cort* criteria unequivocally reveals congressional intent "there is no need for [the court] to 'trudge through all four of the factors.' " *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 388 (1982) (citation omitted). Thus, in determining whether to imply a private right of action, courts must look first to evidence of congressional intent and then address the other factors of the Cort test. *See, e.g., Johnson v. Madigan*, 1992 WL 80952 *2 (N.D. Ga. 1992).

The Eleventh Circuit has explained that when determining whether Congress intended to create or preserve an implied private right of action in a statute, courts should question whether: (1) Congress has specifically indicated the intent to create or preserve such a private right of action; and (2) whether

In *Seif*, a non-profit residents organization sued, among others, the Pennsylvania Department of Environmental Protection and its Secretary, alleging that the Department's issuance of a permit authorizing the operation of a waste facility in a predominantly black community violated disparate impact regulations enacted by the United States Environmental Protection Agency pursuant

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the purposes of the statute would be furthered or thwarted by the creation of such a private right of action. *See generally Liberty National Insurance Holding, Co. v. Charter Co.*, 734 F.2d 545, 558 (11th Cir. 1984); *see also Florida Commercial Banks v. Culverhouse*, 772 F.2d 1513, 1517 (11th Cir. 1985); *Rivers v. Rosenthal & Co.*, 634 F.2d 1534 (5th Cir. 1980), *vacated on other grounds*, 456 U.S. 968 (1982). A regulation promulgated by an administrative agency pursuant to a delegation of Congressional authority is not legislation and, consequently, no indication of Congressional intent can be inferred from such a regulation.

The Third Circuit's three-prong test addresses all of the concerns and factors articulated in the Eleventh and Former Fifth Circuits' analysis, based on *Cort*, of whether to imply private rights of action in a statute, with the added addition of determining whether the agency regulations are properly within the scope of the enabling statute. *Seif*, 132 F.3d at 933. In fact, the Third Circuit's test incorporates the *Cort* factors in the second prong of its analysis. *Id.* at 933. Hence, the court finds that its use of the Third Circuit's test is in accordance with the sum and substance of the Eleventh and former Fifth Circuits' statutory implied right of action case law, and, therefore, proper. *See also, Lowrey*, 117 F.3d at 253 (utilizing *Cort* factors); *Robertson*, 749 F.2d at 534 (applying two-part test to determine whether agency regulations give rise to a private right of action).

Even if the court were to utilize the traditional *Cort* factors in its analysis, however, the court would still find an implied right of action in the regulations. *See infra* note 33.

to Title VI. *Seif*, 132 F.3d at 927. The Third Circuit noted that:

> There is no question that the EPA's discriminatory effect regulation satisfies the first prong. The Supreme Court's unanimous opinion in *Alexander* makes clear that "actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI." 469 U.S. at 293, 105 S.Ct. at 716 (footnote omitted).[21]

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[21] The EPA disparate impact regulation referenced in *Seif* read:

> A recipient shall not use criteria or methods of administering its program which *have the effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex, or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

Seif, 132 F.3d at 929 (citing 40 C.F.R. § 7.35(b)) (emphasis added). The Third Circuit noted that "[t]his regulation clearly incorporates a discriminatory effect standard." *Id.*

Similarly, federal regulations at issue here provide that:

> A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which *have the effect* of subjecting persons to discrimination because of their race, color, or national origin, or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

49 C.F.R. § 21.5(b)(2) (emphasis added).

ii.

The second and third prongs are the crux of this case. In addressing the second, a court will consider the factors set out by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), and its progeny. *See Angelastro*, 764 F.2d at 947.[22] The factors relevant here are: (1) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; and (2) whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." *Cort*, 422 U.S. at 78, 95 S.Ct. at 2088 (citations omitted).[23]

The language of the EPA regulations at issue in *Seif*, and the DOT regulations at issue here, are virtually identical. *See also* 28 C.F.R. § 42.104. As did the *Seif* court with regard to the EPA regulations addressed there, this court finds that the DOT regulations at issue here clearly incorporate a disparate impact standard (prohibiting activities that "have the effect"). *See Seif*, 132 F.3d at 929.

Consequently, because disparate impact regulations further the purposes of the statute and are valid exercises of agency authority, *Alexander*, 469 U.S. at 292-294; *Elston*, 997 F.2d at 1406, the court finds that in this action, the first prong of the Third Circuit's test has been met: The agency rule is properly within the scope of the enabling statute. *See Seif*, 132 F.2d at 933.

[22] *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 947 (3d Cir. 1985).

[23] The other *Cort* factors are: (1) whether the plaintiff is "one of the class for whose especial benefit the statute was enacted, – that is, does the statute create a federal right in favor of the plaintiff"; and (2) whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78, 95

The United States, as amicus, contends that the implication of a private right of action is consistent with legislative intent because Congress acknowledged the existence of the right when it amended Title VI. The purpose of the amendment was to broaden the scope of coverage of Title VI in response to the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), where the Court narrowly construed the terms "program or activity."[24] The United States cites various items of legislative history which it claims indicates an "understanding . . . [of] the existence of the discriminatory effects regulations and the fact that they could be enforced in federal court by private parties." Amicus Br. at 21.

First, the United States relies on a House Report on an early version of the relevant bill, which states that the "private right of action which allows a private individual or entity to sue to enforce Title IX would continue to provide the vehicle to test [certain] regulations in Title IX and their expanded meaning to their outermost limits." H.R.REP. NO. 963, Pt. 1, 99th Cong., 2d Sess. 24 (1986).[25] Second, the United

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S.Ct. at 2088 (citations and internal quotation marks omitted). Clearly, CRCQL satisfies the first. The second is irrelevant because Title VI is federal law. [Footnote 10 in *Seif*].

[Note: "CRCQL" is an acronym for the Seif Plaintiffs].

[24] Section 601 of Title VI prohibits any "program or activity" receiving Federal funds from discriminating on various grounds. *See* 42 U.S.C. § 2000d. [Footnote 11 in *Seif*].

[25] Courts have regarded Title IX and Title VI jurisprudence as, more or less, interchangeable. *See Cannon v. University of*

States relies on several legislators' comments in the Congressional Record, where the legislators appear to recognize the existence of a private right of action.[26] Third, the United States also relies on the following compilations of testimony at congressional hearings: Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 23-24, 153-54,

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Chicago, 441 U.S. 677, 694-96, 99 S.Ct. 1946, 1956-57, 60 L.Ed.2d 560 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefitted class. . . . The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." (footnotes omitted)). [Footnote 12 in *Seif*].

[26] The United States quotes the following observations of Senator Hatch:

> The failure to provide a particular share of contract opportunities to minority-owned businesses, for example, could lead Federal agencies to undertake enforcement action asserting that the failure to provide more contracts to minority-owned firms, standing alone, is discriminatory under agency disparate impact regulations implementing Title VI. . . . Of course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges.

134 CONG.REC. 4,257 (1988).

The United States also quotes a portion of the following statement by Representative Fields: "If a greater percentage of minority than white students fail a bar exam or a medical exam . . . will a State be subject to private lawsuits because the tests have a disproportionate impact on minorities[.]"

130 CONG.REC. 18,880 (1984). [Footnote 13 in *Seif*].

200 (1984); Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the House Comm. on Educ. & Labor and the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 734, 1095, 1099 (1985). The first compilation contains, inter alia, a memorandum by the Office of Management and Budget ("OMB") which states OMB's opinion that "every licensed attorney would be empowered to file suit to enforce the 'effects test' regulations of agencies, challenging practices in every aspect of every institution that receives any Federal assistance." Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 527 (1984).

PADEP presents two responses.[27] First, PADEP emphasizes that the purpose of the amendment of Title VI was to address the Supreme Court's decision in *Grove City*, not to confirm or announce the existence of a private right of action. Second, PADEP reminds the court that many of the above-cited comments may only reflect the views of individual members of Congress. PADEP does not, however, cite to any statements in the Congressional Record or elsewhere that would undermine those cited by the United States.[28] We therefore find that

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[27] "PADEP" is an acronym for the Pennsylvania Department of Environmental Protection.

[28] Nor do Defendants in this action point to any contradictory legislative history. In the case at bar, the private right of action arguments of both Parties are not well-developed, and neither side discusses legislative history in this context. Defendants cite and only superficially discuss *Suter*

there is some indication in the legislative history, here uncontroverted, of an intent to create a private right of action, in satisfaction of the *Cort* factors.

This finding, however, does not end our inquiry. The *Cort* factors also require a court to determine whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff [.]" 422 U.S. at 78, 95 S.Ct. at 2088. Relevant to this inquiry is PADEP's argument that section 602 and the regulations situate the EPA as, in essence, a gatekeeper to enforcement, and that the implication of a private right of action would be inconsistent with this legislative scheme. According to PADEP, section 602 imposes what PADEP terms as "strict preconditions" on the use of that section's enforcement apparatus.[29] Specifically, section 602 provides:

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and *Blessing* in support of their conclusory contention that Plaintiffs have no private right of action. Plaintiffs cite *Guardians* and *Elston* in support of their contention that they do, although they fail to support their citation with meaningful exposition of those cases.

[29] Section 602 provides for the following enforcement apparatus:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its

> [N]o such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1. EPA enforcement action can occur only after the agency has negotiated these procedural requirements. Should we find that it is appropriate to imply a private right of action, PADEP emphasizes that private plaintiffs would not have to negotiate these requirements.

In addition, PADEP emphasizes that the EPA's regulations expressly provide private parties with an administrative mechanism through which they can raise allegations of unintentional discrimination. *See* 40 C.F.R. §§ 7.120-7.130. These regulations provide, in relevant part:

> effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law. . . .

42 U.S.C. § 2000d-1. [Footnote 14 in *Seif*].

> A person who believes that he or she or a specific class of persons has been discriminated against in violation of this Part may file a complaint. The complaint may be filed by an authorized representative. A complaint alleging employment discrimination must identify at least one individual aggrieved by such discrimination. Complaints solely alleging employment discrimination against an individual on the basis of race, color, national origin, sex or religion shall be processed under the procedures for complaints of employment discrimination filed against recipients of federal assistance. Complainants are encouraged but not required to make use of any grievance procedure established under § 7.90 before filing a complaint. Filing a complaint through a grievance procedure does not extend the 180 day calendar requirement of paragraph (b)(2) of this section.

40 C.F.R. § 7.120(a) (citation omitted). In PADEP's estimation, section 602 and the regulations situate the EPA as a gatekeeper to enforcement, with private parties submitting their allegations to the agency and its discretion. PADEP contends that a private right of action is inconsistent with this legislative scheme.

We recognize that PADEP's argument has some force. There is, however, a more convincing counter-argument. The procedural requirements in section 602 provide a fund recipient with a form of notice that the agency has begun an investigation which may culminate in the termination of its funding. We note that a private lawsuit also affords a fund recipient similar

notice. If the purpose of the requirements is to provide bare notice, private lawsuits are consistent with the legislative scheme of Title VI. Furthermore, unlike the EPA, private plaintiffs do not have the authority to terminate funding.[30] As a result, the purpose that the requirements serve is not as significant in private lawsuits, where the potential remedy does not include the result (i.e., termination of funding) at which Congress directed the requirements. Stated differently, the requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate. Based on the foregoing, we find that the implication of a private right of action would be consistent with the legislative scheme of Title VI.[31]

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[30] While it is well established that private plaintiffs do not have the authority to compel a termination of funding, we make no determination at this time as to what alternative remedies offer appropriate relief for plaintiffs who prevail in actions to enforce agency regulations brought pursuant to section 602. *See NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1254 n.27 (3d Cir. 1979). *See also Cannon*, 441 U.S. at 711-17, 99 S.Ct. at 1965-68 (discussing the legislative history of Title VI as it relates to the implication of a private remedy for victims of discrimination). Rather, should relief prove warranted in this case, we leave the determination of the appropriate remedy to the district court in the first instance. [Footnote 15 in *Seif*].

[31] Although in the case at bar, the Defendants do not argue that the statute and regulations situate the federal agencies providing funds to the Department as a "gatekeeper" as was argued of the EPA in *Seif*, the Defendants do contend that "[i]f the Department were to violate the terms of the grant, [the relevant agency], not the general public, should enforce compliance." (Defs.' Mem. at 12.) The Department makes this unsupported assertion in the context of citing to *Suter* and *Blessing*, and while arguing that a particular grant did not provide "particularized benefits" to the Plaintiffs. (*Id.*)

In sum, we find that there is some indication in the legislative history of an intent to

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This court agrees with the *Seif's* court reasoning and ultimate conclusion as it relates to the enforcement scheme outlined in § 2000d-1 and as to regulations enacted pursuant to that statutory provision. In *Seif*, PADEP relied on 40 C.F.R. §§ 7.120-7.130 in support of its argument. Here, 49 C.F.R. § 21.11(b) is applicable and closely analogous:

> (b) *Complaints.* Any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary a written complaint. A complaint must be filed not later than 180 days after the date of the alleged discrimination, unless the time for filing is extended by the Secretary.

49 C.F.R. § 21.11(b). The regulations are remarkedly similar.

In addition, and in contrast to the EPA regulation at issue in *Seif*, this DOT regulation does not "encourage" complainants to make use of a grievance procedure before filing a complaint. *Cf.* 40 C.F.R. § 7.120(a) with 49 C.F.R. § 21.11(b). The DOT regulations merely provide that a person who believes himself or a specific class of persons to be subjected to discrimination "may" file a complaint. 49 C.F.R. § 21.11(b). Nothing in the regulations would lead to the conclusion that enforcement mechanisms allowed in the regulations were mandatory or conditions precedent to filing suit. Accordingly, the Third Circuit's reasoning, based on an analysis of § 2000d-1 and a virtually identical regulation, is applicable here.

Further, although not raised here or in *Seif*, the court notes that the statutory and regulatory provisions encouraging informal attempts at obtaining compliance prior to filing suit do not support the "gatekeeper" argument either. *See, e.g.*, § 2000d-1; 49 C.F.R. §§ 21.11(d), 21.13(a). As *Cannon*, *Alexander* and *Guardians* note, the statute itself contains an implied private right of action, even though § 2000d-1 mandates informal attempts at

create a private right of action and that the implication of a private right of action would be consistent with the legislative scheme of Title VI, in accordance with the relevant *Cort* factors. Accordingly, we find that " 'the statute under which the rule was promulgated properly permits the implication of a private right of action,' " *Polaroid Corp.*, 862 F.2d at 994 (quoting *Angelastro*, 764 F.2d at 947),[32] and that the second prong of the test is satisfied.[33]

iii.

The third prong of the test requires the court to inquire " 'whether implying a private right of action will further the purpose of the enabling

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securing compliance. 49 C.F.R. § 21.13(a) provides that "if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected . . . by any other means authorized by law." In contrast to the statute (§ 2000d-1), this regulatory provision is permissive; it does not require complainants to comply with its provisions.

Finally the court notes that in this action, as discussed in *Seif*, private litigants are not seeking the termination of funding, but the cessation of activity that violates Title VI's prohibition of discrimination in federally funded programs or activities. As the Third Circuit noted, "the [procedural] requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate [termination of funding]." *Seif*, 132 F.3d at 936.

[32] *Polaroid Corp. v. Disney*, 862 F.2d 987 (3d Cir. 1988).

[33] For the reasons outlined above, this court agrees with the Third Circuit's conclusion that under an analysis of the legislative history and the relevant *Cort* factors, "the statute under which the rule was promulgated properly permits the implication of a private right of action." *See Seif*, 132 F.2d at 936 (citations omitted); *see also Lowrey*, 117 F.3d at 253; *see further supra* note 20.

statute.' " *Id.* (quoting *Angelastro*, 764 F.2d at 947). The United States contends that this prong is satisfied because the implication of a private right of action under section 602 and the regulations will further the dual purposes of Title VI, which are to: (1) combat discrimination by entities who receive federal funds; and (2) provide citizens with effective protection against discrimination. *See Cannon*, 441 U.S. at 704, 99 S.Ct. at 1961. A private right of action will further these purposes, the argument goes, because it will deputize private attorneys general who will enforce section 602 and its implementing regulations. The United States, moreover, points out that the EPA itself lacks sufficient resources to achieve adequate enforcement.

We agree with the United States that, to the extent that a private right of action will increase enforcement, the implication of that right will further the dual purposes of Title VI. Consequently, we find that the third prong of the test is also satisfied.[34]

iv.

Lastly, although no other court of appeals has rendered a holding on the precise issue before this court, we note that the decisions of other courts of appeals indicate support for our reasoning. *See, e.g., Latinos Unidos De Chelsea v. Secretary of Hous. & Urban Dev.*, 799 F.2d 774, 785 n.20 (1st Cir. 1986) ("Under the statute itself, plaintiffs must make a showing of discriminatory intent; under the regulations, plaintiffs simply must show a discriminatory impact."

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[34] This court agrees and so finds.

(citation omitted)); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) ("Courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance. A plaintiff alleging a violation of the DOT regulations must make a prima facie showing that the alleged conduct has a disparate impact." (citations omitted)); *Castaneda by Castaneda v. Pickard*, 781 F.2d 456, 465 n. 11 (5th Cir. 1986) ("Thus a Title VI action can now be maintained in either the guise of a disparate treatment case, where proof of discriminatory motive is critical, or in the guise of a disparate impact case, involving employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another. In this latter type of case, proof of discriminatory intent is not necessary." (citation omitted)); *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1356 n. 5 (6th Cir. 1996) ("A plaintiff may pursue a claim under a disparate impact theory as well. However, a disparate impact theory is not applicable in the case at hand." (citation omitted)); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988) ("It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act. Moreover, plaintiffs need not show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations. Evidence of a discriminatory effect is sufficient." (citation omitted)); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1044-45 (7th Cir. 1987) ("Although the voting of the Justices may be difficult for the reader to discern at first, a majority of the Court in *Guardians Association*

concluded that a discriminatory-impact claim could be maintained under those regulations, although not under the statute." (citations omitted)); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 981-82 (9th Cir. 1984) ("[P]roof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute rather than the statute itself." (footnote omitted)); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996) ("Although Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent." (citation omitted)); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993) ("While Title VI itself, like the Fourteenth Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory." (citations omitted)); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) ("There is no doubt that the plaintiffs predicated this cause of action on the regulations. As a result, the district court correctly applied disparate impact analyses to their Title VI claims." (footnote omitted)).

v.

In conclusion . . . we hold that private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal

> administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964. . . .

Seif, 132 F.3d at 936-37.

In addition to the foregoing, the court also notes that Title VI relationships are, essentially, contractual in nature. *See United States Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 605-06 (1986) ("Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the non-discrimination provision"); *see also Moore v. Sun Bank of North Florida, N.A.*, 923 F.3d 1423, 1432 (11th Cir. 1991) (noting contractual nature of Title VI relationship). Because of these contractual relationships, the court finds that Plaintiffs retain a private right of action as third-party beneficiaries to contracts entered into by the Department that contain provisions requiring the Department to comply with federal non-discrimination laws as a condition of receiving federal funds.

Title VI "is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to fix the terms on which Federal funds shall be disbursed." *Guardians*, 463 U.S. at 599; *see also Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (noting that it was well established that Congress has the power to fix the terms under which it disburses federal money to the states); *see further Suter*, 502 U.S. at 356. Title VI liability, therefore, is based on the contractual-type relationship between the federal government and the recipient of federal funds. *See, e.g., Godby v. Montgomery County Board of Education*, 1998 WL 119956 * 21

(M.D.Ala.1998); (*see also* Defs.' Add. Auth. at 1 (acknowledging that federal funds received by state pursuant to grants are "fundamentally, contracts between a federal agency and the State of Alabama").)

Congress utilizes its spending power "to induce governments and private parties to cooperate voluntarily with federal policy." *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980). When a state accepts federal money, it also accepts the conditions Congress has attached to its offer. *See South Dakota v. Dole*, 483 U.S. 203 (1987); *Davis*, 120 F.3d at 1399. These conditions include the promise to not discriminate. As the *Davis* court noted:

> A prospective recipient is free to decline a grant of federal funding. . . . Similarly, a current recipient may withdraw from a federal program and decline further funding if it so chooses. . . . The freedom of recipients to decline prospectively or to terminate retrospectively a grant of federal funding ensures that they will remain responsive to the preferences of their local constituents.

Davis, 120 F.3d at 1399 (citations omitted). When the foregoing is put in the vernacular, it is clear that "he who pays the piper calls the tune." *See Guardians*, 463 U.S. at 599 (White, J.) ("Stop the discrimination, get the money; continue the discrimination, do not get the money").

The relevance of the contractual nature of Title VI relationships to whether § 2000d-1 regulations allow for private rights of action is as follows: The purpose of Title VI is to ensure that "no person" is subject to discrimination in federally funded programs. *See* 42 U.S.C. § 2000d. When states enter into contracts containing provisions

that hinge funding on compliance with federal non-discrimination laws, including Title VI, the "persons" protected by Title VI are intended third-party beneficiaries to these contracts.[35] *See Bossier Parish School Board v. Lemon*, 370 F.2d 847, 850 (5th Cir. 1967) ("Defendants by their contractual assurances have afforded rights to [plaintiffs] as third-party beneficiaries"); *see also Guardians*, 463 U.S. at 633 (Marshall, J., dissenting); *Id.* at 603, n. 24 (Stewart, J.); *Lau v. Nichols*, 414 U.S. 563, 571 n. 2 (1974) (Stewart, J. concurring); *Soberal-Perez v. Heckler*, 717 F.2d 36, 40-41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1989). Private persons subjected to discrimination in violation of Title VI, although not parties to the applicable contracts, are those for whose benefit the promise not to discriminate is secured. These third-parties may bring viable causes of action pursuant to contractual provisions securing promises to comply with Title VI and applicable regulations. *See Lemon*, 370 F.2d at 850-51; *Beverly v. Macy*, 702 F.2d 931

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[35] For determining whether an implied private right of action exists pursuant to a statute, the first *Cort* factor queries who the intended beneficiaries of a regulation – such as a disparate-impact regulation – are. The inquiry is whether the plaintiff at bar is a member of the special class for whose benefit the regulation was enacted. *Cort*, 422 U.S. at 78. It is clear that disparate impact regulations are enacted for the benefit of those "persons" protected by § 2000d's prohibition of discrimination based on race, color or national origin. *See Lowrey*, 117 F.3d at 250. Consequently, the court can conclude that by extension, contractual provisions requiring compliance with Title VI and its regulations, are entered into for the benefit of those same "persons" for whom disparate impact regulations are promulgated, and Title VI (§ 2000d) was enacted. Those persons are the "intended" third-party beneficiaries of contractual compliance provisions.

(11th Cir. 1983); *see also Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980); *Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1555, n. 4 (11th Cir. 1983); *Bryan v. Koch*, 627 F.2d 612, 616 (2d Cir. 1980); *Collins v. International Dairy Queen, Inc.*, 1998 WL 136501 *3 (M.D.Ga. Mar 23, 1998); Block, Arthur R., *Enforcement of Title VI Compliance Agreements By Third-Party Beneficiaries*, 18 Harvard C.R.-C.L.L.Rev. 1. (1983).

The Department has entered into contractual-type grant agreements containing assurance of compliance provisions. A typical assurance of compliance provisions provides:

> The applicant/recipient hereby agrees that, as a condition to receiving any Federal financial assistance from the Department of Transportation, it will comply with Title VI of the Civil Rights Act of 1964, related nondiscrimination statutes, and applicable regulatory requirements to the end that no person in the United States shall, on the grounds of race, color, national origin, sex, handicap or age, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity for which the applicant/recipient receives Federal financial assistance. The specific requirements of the United States Department of Transportation standard Civil Rights assurances with regard to the States' highway safety program (required by 49 CFR 21.7 and on file with the U.S. DOT) are incorporated into this grant agreement.

(*See* Pls.' Opp'n, Ex. 27 at 2, ¶ 11; *see also* Pls.' Tr. Ex. 27 at 4, ¶ 4.) Consequently, as intended third-party beneficiaries to contractual provisions like the one cited above, Plaintiffs have standing to enforce the Department's

promise to comply with Title VI and applicable regulatory requirements. *See Lemon*, 370 F.2d at 851 (holding in class action educational desegregation case that "[w]hen defendants received and accepted federal funds . . . they became bound by Section 601 [§ 2000d] . . . [c]onsequently, plaintiffs are entitled to bring this class action suit either under Section 601 of the Civil Rights Act of 1964 [§ 2000d] or under the contractual assurances by which defendants are estopped to deny them the . . . rights to attend desegregated schools"); *see also United States v. Frazer*, 297 F.Supp. 319, 324 (M.D.Ala.1968).

Finally, the court notes that when Congress intends to limit a private right of action for civil rights violations, it does so explicitly. *See* Title II and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-a-3(d) and 2000-e. Congress has not done so in the Title VI context, and the disparate impact regulations at issue here were promulgated pursuant to an express grant of rulemaking authority and are properly within the scope of that authority. *See* 42 U.S.C. § 2000d-1; *Alexander*, 469 U.S. at 222; *Elston*, 997 F.2d at 1394. Accordingly, there is no principled basis upon which to distinguish the established statutory implied right of action from the right of action at issue here. *See Lowrey*, 117 F.3d at 253. Therefore the court concludes that the private right of action created by Title VI incorporates the disparate impact regulations found, among other places, at 49 C.F.R. § 21.5(b)(2) and 28 C.F.R. § 42.104(b)(2). *See Id.* (utilizing similar reasoning to reach similar finding in Title IX context); *see also Cannon*, 441 U.S. at 694-96 (noting interchangeability of Title VI and Title IX jurisprudence).

Based on the foregoing, the following factors lead the court to the finding that a private cause of action may be brought pursuant to regulations enacted pursuant to § 2000d-1: (1) the implicit reasoning of the Supreme Court in *Guardians*, *Alexander*, and *Lau*; (2) the implicit reasoning of the Eleventh Circuit in *Elston* and *Georgia State Conference*; (3) the implicit reasoning of the Eleventh Circuit in *Doe* and *Harris* (Title VI in conjunction with the regulations); (4) the explicit reasoning of the Third Circuit in *Seif* and the reasoning of other courts that have addressed the issue; and (5) the Department's contractual guarantees. All, any one, or two or more of these factors in combination, lead the court to the conclusion and finding that private causes of action may be brought pursuant to disparate impact regulations enacted via § 2000d-1.

3. Plaintiffs have the requisite standing to bring suit

The court now turns to Defendants' contention that even if the Department is a recipient of federal funds within the meaning of Title VI, and even if private causes of action may be brought pursuant to Title VI disparate impact regulations, the Plaintiffs at bar lack the requisite standing to bring the claims asserted.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This inquiry involves both constitutional limitations on federal-court jurisdiction, such as Article III's "case or controversy" requirement, and prudential limitations on its exercise. *Id.*

In *Bennett v. Spear*, ___ U.S. ___, ___, 117 S.Ct. 1154, 1161 (1997), the Court summarized the constitutional requirements of standing:

> [The] "irreducible constitutional minimum" of standing requires: (1) that the plaintiff have suffered an "injury in fact" – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. ___ U.S. at ___, 117 S.Ct. at 1163 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "When the suit is one challenging the legality of government action or inaction, . . . standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62. Plaintiffs bear the burden of establishing each of the elements of constitutional standing. *Id.*

Plaintiffs' Complaint alleges, and, as outlined below, the evidence in this matter establishes, that Plaintiffs at bar have suffered and will continue to suffer an actual, concrete, particularized injury in that, simply put, non-English speaking residents of Alabama are not given the

opportunity to prove their knowledge of the rules of the road and are thus prevented from completing the entire examination process and obtaining a license.

The Complaint alleges, and the court finds, as outlined below, a causal connection between the injury complained of by the Plaintiffs and the conduct of the Defendants. While it is undoubtedly true that some non-English speakers would fail the written examination even if it were provided in an applicant's native language, it is also true that, by requiring that examinations be administered only in English, non-English speakers are not even provided with the opportunity to pass that portion of the testing process, and, consequently, such individuals are precluded from obtaining a license.

Finally, the court finds that the Plaintiffs' injury is capable of redress via a favorable decision. Indeed, enjoinment of the offensive conduct will cure the injuries complained of. Consequently, the court finds the Plaintiffs have met their burden of establishing Article III standing.

Prudential standing requirements are not mandated directly by Article III but, as the word "prudential" indicates, are judicious limits on the exercise of jurisdiction by federal courts. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474-75 (1982); *Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1526 (11th Cir. 1993). Prudential considerations include the requirement that a plaintiff's grievance arguably fall within the "zone of interest" protected by the statute or constitutional right invoked, the

principle that courts should avoid deciding generalized grievances, and the requirement that a litigant assert his or her own rights or interests and not those of a third party. *Bennett*, ___ U.S. at ___, 117 S.Ct. at 1161; *see also Hill v. Butterworth*, 941 F.Supp. 1129, 1137 (N.D.Fla.1996) (listing prudential limitations on standing). The zone of interest and generalized grievance considerations are implicated here.

Turning first to the zone of interest inquiry, the court's task is limited to the examination of "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected . . . by the statute." *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 118 S.Ct. 927, 935 (1998) (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). To so determine, the court need not find an "indication of congressional purpose to benefit the would be plaintiff." *Id.* at 935 ("Our prior cases . . . have consistently held that for a plaintiff's interests to be arguably within the "zone of interests" to be protected by a statute, there does not have to be an "indication of congressional purpose to benefit the would-be plaintiff" (citations omitted)). In other words, courts need not ask "whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff."[36] *Id.*

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[36] The majority's statement in *National Credit Union* that specific congressional intent to benefit the plaintiff need not be shown, seemingly contradicts previous Supreme Court and Eleventh Circuit cases describing the proper analysis as entailing the ascertainment of "whether the . . . statutory provision confers rights *intended* by the legislature to be

Plaintiffs seek relief from the discrimination on the basis of national origin engendered by the Department's

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enforceable under the remedial statute." *Church of Scientology*, 2 F.3d at 1526 (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, ___, 112 S.Ct. 1311, 1328 (1992) (Scalia, J., concurring) (zone of interests test is an "element of statutory standing")).

In *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1378 (11th Cir. 1997), the Eleventh Circuit stated that the zone of interest test requires courts to examine the "nature and source" of the plaintiff's allegations and inquire whether the Congress, in passing the laws at issue, intended to confer the right to sue upon individuals in the position of the Plaintiffs. *Id.* (quoting *Warth*, 422 U.S. at 500). Of course, *National Credit Union* speaks of not inquiring into whether Congress intended to benefit the Plaintiff when it passed the statute at issue, while *Brooks* and *Church of Scientology* (citing to Supreme Court cases) speak of an inquiry into whether Congress intended to provide for a private right of action. Nevertheless, both Eleventh Circuit pronouncements were asserted in the context of determining statutory standing.

Having to show congressional intent seems intertwined with the analysis of whether a particular statute or regulation allows for a private right of action. *See Brooks*, 116 F.3d at 1378 (concluding that Congress did not intend to create a private cause of action under the statute at issue and thus that plaintiffs at bar lacked prudential standing to pursue their claim). It is clear that Title VI itself provides for an implicit private right of action, and the court has found above that private causes of action may be brought pursuant to regulations effectuating the purpose of Title VI. As part of the court's findings above, the court noted that Plaintiffs, among others, fall within the class of intended beneficiaries of Title VI's prohibition of discrimination in federally funded programs or activities on the basis of race, color or national origin. Consequently, based on the court's private right of action analysis, the court can conclude that the Plaintiffs at bar meet the prudential statutory standing

English-only policy. As the court noted earlier in its private right of action analysis, Plaintiffs' interests clearly

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requirement; Plaintiffs' interests "arguably" fall within the zone of interest protected by the statute. *Camp*, 397 U.S. at 153.

To further confuse or perhaps enlighten the congressional intent issue, the Supreme Court and the Eleventh Circuit have noted that the test does not require the plaintiff to show an identifiable "legal interest" that may entitle him or her to relief, *Camp*, 397 U.S. at 153-56; *see also Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987); *Church of Scientology*, 2 F.3d at 1526, but only that the relationship between the plaintiff's alleged interest and the purposes implicit in the substantive provision be more than "marginal[ ]." *Church of Scientology*, 2 F.3d at 1526 (quoting *Clarke*, 479 U.S. at 399).

If the text of a statute is not dispositive, it is not clear to the court how a plaintiff is to establish that they "arguably" fall within the zone of interests protected by the statute or that their alleged interest is more than "marginally" related to the substantive statutory provisions without an examination of congressional intent. Otherwise, courts would be left to their own devices in construing ambiguous statutes. This outcome is inconsistent with the overlapping analysis of whether legislative or administrative enactments contain implied private rights of action (although they were intertwined in *Brooks* and *Church of Scientology*). A finding of no implied private right of action necessarily entails a finding that the plaintiff's interests do not fall within the zone of interests protected by the statute. Indeed, the first of the *Cort* factors utilized to determine whether a statute provides for a private right of action, examines whether the statute at issue was passed for the "especial benefit" of the plaintiff at bar, and the second factor examines legislative intent. *See Cort*, 422 U.S. at 78. In making this analysis, the Supreme Court has noted that congressional intent is the touchstone of the court's analysis. *See Thompson*, 484 U.S. at 174.

National Credit Union clearly states that congressional intent to benefit the plaintiff need not be shown. Cases such as *Holmes*,

more than "arguably" fall within the zone of interest protected by the statute and the regulations. In fact, even though not necessary to meet the requirements of statutory standing, the court finds the specific Congressional intent, in Title VI, to benefit the Plaintiffs' class at bar. Their interests are squarely addressed by the statute.

Warth, *Church of Scientology* and *Brooks*, however, indicate otherwise. Indeed, the four dissenters in *National Credit Union* accused the majority of "eviscerat[ing]" or "abolishing" the zone of interest requirement altogether. *National Credit Union*, 118 S.Ct. at 940, 943 (O'Connor, J., dissenting). The majority's response to the dissent's concerns noted that:

> the test we have articulated – discerning the interests "arguably . . . to be protected" by the statutory provision at issue and inquiring whether the plaintiff's interests affected by the agency action in question are among them – differs only as a matter of semantics from the formulation that the dissent has accused us of "eviscerating" or "abolishing."

Id. at 936 n. 7. At least one court has noted the confusion over whether *National Credit Union*'s "restatement" of the state of the law is actually a restatement, or, as the *National Credit Union* dissenters argue, the evisceration of the court's zone of interest inquiry. *See Bryant v. New Jersey Dept. of Transp.*, 1998 WL 133758 *6 (D.N.J. March 18, 1998) (noting confusion in doctrine and predicting that note 7 in *National Credit Union* [quoted above] "will engender considerable debate in the future").

Regardless of whether congressional intent is a relevant element of the analysis, which *National Credit Union* unequivocally states that it is not, the court notes that under either analysis, Plaintiffs meet the prudential statutory standing requirements. At the least, it is clear that "the relationship between the [Plaintiffs'] alleged interest and the purposes implicit in the substantive provision [are] more than [marginal]." *Church of Scientology*, 2 F.3d at 1526.

Accordingly, the court finds that under the zone of interest inquiry, Plaintiffs meet prudential statutory standing requirements. *See Lemon*, 370 F.2d at 852 (finding that plaintiffs there "as beneficiaries of the Act, have standing to assert their section 601 [§ 2000d] rights").

As for prudential standing prohibitions on court's deciding "generalized grievances," Defendants argue that "[t]he absence of any link between the federal grants and the injuries plaintiffs claim to have suffered attenuates their standing." (Defs.' Reply at 14.) This argument is based on Defendants' erroneous position, (as discussed above), that Title VI only applies to the specific program or activity receiving federal funds. Accordingly, on that basis alone, Defendants' argument fails.

Nevertheless, Defendants point to language in *United States v. Hays*, 515 U.S. 737 (1995), which notes that "we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Hays*, 515 U.S. at 743. A thorough reading of *Hays* discloses, however, that in noting the prohibition of generalized grievances, the Supreme Court was merely reiterating the fact that injuries inflicted by governmental actors "accord[ ] a basis for standing only to 'those persons who are personally denied [the constitutional, statutory or other legal protection]' by the challenged discriminatory conduct." *Id.* at 743-44 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). Accordingly, the Court rejected the proposition that "anybody in the State has a claim." *Hays*, 515 U.S. at 744.

The rule against generalized grievances merely prevents citizens from suing if their only injury is as a taxpayer or citizen seeking to stop allegedly unconstitutional governmental conduct. *See Warth v. Seldin*, 422 U.S. 490 (1975) (citing to *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Ex Parte Levitt*, 302 U.S. 633 (1937) as examples); *see also Schrenko*, 109 F.3d at 689 n. 19 ("in order to have standing to sue in federal court, a plaintiff must allege an injury in fact distinct from that suffered by all or a large class of citizens" (citing *Warth*, 422 U.S. at 499)). All of these actions involved plaintiffs suing not on the basis of an injury to their personal rights but instead as taxpayers or citizens objecting to government conduct. Here, in contrast, Plaintiffs allege, as a class, the specific violation of their personal right, provided by Title VI, to be free from discrimination in federally funded programs or activities. Their suit is not brought as citizens or taxpayers, but as a legally cognizable protected class of individuals subjected to unlawful discrimination. The court finds that Plaintiffs are "persons who are personally denied [the statutory protections] . . . by the challenged discriminatory conduct," *Hays*, 515 U.S. at 743-44, and accordingly rejects Defendants' generalized grievance argument.

4. The Eleventh Amendment does not bar Plaintiffs' suit

Having found that the Department is a recipient of federal-funds within the meaning of Title VI; that disparate impact regulations allow for private causes of action;

and that Plaintiffs at bar possess the constitutional and prudential standing necessary to prosecute this action, the court now turns to the consideration of whether the Eleventh Amendment bars Plaintiffs' claims. Having gone through the foregoing analysis, predictably, the court concludes that it does not.

In this action, Plaintiffs have named as Defendants both the Department of Public Safety and its Director, in his official capacity. Separate immunity analyses apply to each named Defendant. *See Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1039 (7th Cir. 1987) (noting different analyses for State School Board and its Superintendent).

Addressing the Department first, it is an agency of the state, and it is clear that absent its consent or waiver, a state may not be sued in federal court unless Congress has clearly and unequivocally abrogated the state's Eleventh Amendment immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240-41 (1985); *DeKalb County School District v. Schrenko*, 109 F.3d 680, 688 (11th Cir. 1997). In the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, Congress did just that: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964." 42 U.S.C. § 2000d-7.

Until recently, this express statutory language would have ended the court's inquiry. In § 2000d-7, Congress has unequivocally expressed its intent to abrogate the State's immunity under Title VI. *See* 42 U.S.C. § 2000d-7(a)(1); *Lane v. Pena*, 518 U.S. 187, 198 (1996) ("by

enacting [§ 2000d-7], Congress sought to provide the sort of unequivocal waiver that our precedents demand"); *see also Id.* at 200 (noting that Congress "craft[ed] an unambiguous waiver of the States' Eleventh Amendment immunity in [§ 2000d-7]"); *see further Clark v. State of California*, 123 F.3d 1267, 1269-70 (9th Cir. 1997). Consequently, it is clear that "Congress has abolished the states' immunity for causes of action grounded in Title VI. . . . Thus, the State could be forced to defend a Title VI action in federal court without its consent." *Schrenko*, 109 F.3d at 688; *see also Lane*, 518 U.S. at 200.

The Supreme Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), however, requires courts, after first asking "whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' " *Id.* at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)), which it has in § 2000d-7, to then ask "whether Congress has acted 'pursuant to a valid exercise of power' " in abrogating the immunity. *Id. Seminole Tribe* held that the only valid source of constitutional power that permits Congress to abrogate states' Eleventh Amendment immunity is § 5 of the Fourteenth Amendment. *Id.* at 59.

It is not clear, however, that the *Seminole Tribe* analysis applies in the context of this action. Specifically, Title VI is Spending Clause legislation that does not force abrogation upon unwilling states, but rather induces states to voluntarily waive sovereign immunity in exchange for federal funds. The key distinction is that at all times, the states are free to choose whether to waive their immunity as opposed to the forced unilateral abrogation that concerned the Court in *Seminole Tribe*. *See Beasley v. Alabama State Univ.*, 1998 WL 136119 *3 (M.D.

Ala. March 23, 1998) (declining to apply *Seminole Tribe* in Title IX context because like Title VI, "it is a spending clause enactment and therefore does not thrust abrogation upon potentially unwilling states, but rather conditions the receipt of federal funds . . . upon the states' voluntary waiver of sovereign immunity"); *see also Cannon*, 441 U.S. at 694-96 (noting interchangeability of Title VI and Title IX jurisprudence).

The *Beasley* court found that "because no 'abrogation' is involved in the Title IX context, the *Seminole Tribe* test is inapplicable here," and focused its analysis on whether Congress could validly condition federal funding on a voluntary waiver of immunity under the Spending Clause. *Beasley*, 1998 WL 136119 at *5. After an exhaustive review of applicable case-law, the *Beasley* court concluded that "the spending clause does empower Congress to require that states waive their eleventh amendment immunity when they accept the use of federal funds." *Beasley*, 1998 WL 136119 at *11; *see also Lau*, 414 U.S. at 568 (where the Court approved the conditioning of federal funds on voluntary compliance with non-discrimination requirements: "The federal regulations reviewed in *Lau*, primarily regulated state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions." *Fullilove v. Klutznick*, 448 U.S. 448, 479 (1980), *abrogated on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)).

The well-developed analysis in *Beasley* is appealing, and the court finds it applicable to the case at bar, particularly because the Supreme Court's inquiry in *Seminole*

Tribe was "narrowly focused" on the source of Congressional power "to abrogate unilaterally the States' immunity." *Seminole Tribe*, 517 U.S. at 59. In contrast to unilateral abrogation, nowhere does *Seminole Tribe* address voluntary consent to suit or waiver of Eleventh Amendment immunity by a state, except, tellingly, to note the "unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity." *Id.* at 65.

It is clear that the Department has entered into contracts conditioning the receipt of federal funds on its agreement to comply with federal non-discrimination statutes and regulations. Title VI clearly prohibits such discrimination, and clearly abrogates state immunity. By entering into those contracts, the Department has waived any immunity to which it may be entitled. Because the federal government may condition the receipt of federal funds on state waiver of immunity under the Spending Clause, the court finds that the Eleventh Amendment does not bar Plaintiffs' suit. *See Beasley*, 1998 WL 136119 at *3.

Assuming *Seminole Tribe* applies, however, it is clear that "Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' " *Seminole Tribe*, 517 U.S. at 54 (citation omitted); 42 U.S.C. § 2000d-7. Consequently, the court turns to the analysis of whether Congress, in enacting 42 U.S.C. § 2000d-7, has acted " 'pursuant to a valid exercise of power' " in abrogating states' immunity. *Seminole Tribe*, 517 U.S. at 54 (citation omitted). This inquiry is

"narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provisions granting Congress the power to abrogate?" *Id.* at 59 (citation omitted).

Seminole Tribe does not clearly articulate what "the Act in question" is. *Id.* In *Seminole Tribe*, the Court addressed the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2702, which contained an express abrogation provision at the time of enactment. *See* 25 U.S.C. § 25710(d)(7); *Seminole Tribe*, 517 U.S. at 57. Title VI, however was passed in 1964, while the abrogation provision, § 2000d-7, was passed in 1986. Does the court examine the act abrogating immunity or does the court examine the existing, substantive act to which the abrogation applies?

In *Seminole Tribe*, the Court cited to *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976), as an example of previous inquiries into the constitutional source of Congress' power to abrogate. In *Fitzpatrick*, the Court examined the 1972 Amendments to Title VII of the Civil Rights Act of 1964, and concluded that "in enacting the 1972 Amendments to Title VII . . . Congress exercised its power under § 5 of the Fourteenth Amendment." *Id.* at 453 n.9. In contrast, Title VII of the Civil Rights Act of 1964 was enacted pursuant to Congress' commerce power. *United Steelworkers of America v. Weber*, 443 U.S. 193, 207 n.6 (1979); *see also Johnson v. Transportation Agency, Santa Clara, California*, 480 U.S. 616, 628 (1987); *Edwards v. City of Houston*, 37 F.3d 1097, 1110 n.9 (5th Cir. 1994); *but see Regents of the University of California v. Bakke*, 438 U.S. 265, 366-67 (Blackmun, White, Marshall, JJ., concurring in the judgment in part and dissenting in part) (stating the Title

VII was enacted pursuant to the Commerce Clause and § 5 of the Fourteenth Amendment); *Davis v. Monroe County Board of Education*, 120 F.3d 1390, 1400 n.13 (11th Cir. 1997) (stating that Title VII was enacted pursuant to the Commerce Clause and § 5 of the Fourteenth Amendment).

Fitzpatrick and *Seminole Tribe* indicate that where a statutory provision is enacted abrogating state immunity in relation to an earlier passed statute, courts are to examine the constitutional source of power of the "act" abrogating immunity, and not the constitutional source of power of the existing statute. If this is the rule, and § 2000d-7 was enacted pursuant to § 5 of the Fourteenth Amendment, then in enacting § 2000d-7, Congress was acting pursuant to a constitutional provision granting Congress the power to abrogate. *Seminole Tribe*, 517 U.S. at 59; *Fitzpatrick*, 427 U.S. 452-56.

In spite of the literal language of *Seminole Tribe* and *Fitzpatrick*, however, other courts have examined the constitutional source of power of the underlying, existing substantive statute rather than the source of power of the later enacted abrogation provision. *See, e.g., Crawford v. Davis*, 109 F.3d 1281, 82-84 (8th Cir. 1997) (holding that Title IX was enacted pursuant to § 5 of the Fourteenth Amendment, consequently under *Seminole Tribe*, Title IX [42 U.S.C. § 2000d-7] abrogated States' Eleventh Amendment immunity); *see also Franks v. Kentucky School for the Deaf*, 1998 WL 193177 (6th Cir. 1998) (similar); *Doe v. University of Illinois*, 1998 WL 88341 (7th Cir. 1998) (similar); *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997) (similar). None of these courts addressed the question of which "act" to evaluate. Instead, after outlining

Seminole Tribe, they proceeded to address the substantive statute at issue. Indeed, the question of which "act" to evaluate seems fallacious given that the abrogation provision at issue (§ 2000d-7) is necessarily tied to the substantive statute to which it applies. Nevertheless, the literal terms of *Seminole Tribe* and its reliance upon *Fitzpatrick* indicate such an inquiry. Under such, the *Seminole Tribe* test is met, and Congress has validly abrogated states' immunity under Title VI.

If courts are to examine the existing, substantive act, however, rather than the act providing abrogation, the law of this circuit is that Title VI was enacted pursuant to the Spending Clause of Article I. *Davis v. Monroe County Board of Education*, 120 F.3d 1390, 1398 (11th Cir. 1997) ("In [*Guardians*], at least six members of the Supreme Court agreed that Title VI was enacted under the Spending Clause"), *id.* at 1399 (finding "Title IX, like Title VI, was enacted under Congress' power to spend for the general welfare of the United States").[37] *Seminole Tribe* provides that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 73. Should the inquiry be focused on the existing, substantive act (Title VI), rather than the later enacted abrogation provision (§ 2000d-7), and should the analysis cease at this point, without examining whether Congress *could have* acted pursuant to another

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[37] Although other Courts of Appeals disagree with the conclusion that Title IX and Title VI were enacted solely pursuant to the Spending Clause, and make persuasive arguments in support of their holdings, this court is bound by the mandates of the Eleventh Circuit. *See, e.g., Crawford*, 109 F.3d at 82-84; *Franks*, 1998 WL 193177.

constitutional provision, or whether the state has waived its immunity, the court would be compelled to conclude that Congress' abrogation of immunity under Title VI was ineffective, and, consequently, that in this action, the Eleventh Amendment barred Plaintiffs' claims against the Department.

Despite this finding however, two factors, besides the court's reliance on *Beasley*, operate to preserve Plaintiffs' claims. First, those courts analyzing the source of power of the underlying, existing substantive statute, have also defined the inquiry as not reliant solely on the source of power under which Congress was explicitly acting; they have also examined whether Congress *could have* utilized other constitutional powers in enacting specific legislation. *See, e.g., Crawford v. Davis*, 109 F.3d 1281, 82-84 (8th Cir. 1997) (defining the inquiry as "whether Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power to abrogate. As long as Congress had such authority as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant"); *Franks v. Kentucky School for the Deaf*, 1998 WL 193177 (6th Cir. 1998) ("question is whether Congress actually had the authority to adopt the legislation pursuant to that provision, not whether Congress correctly guessed the source of its authority"); *see also Doe v. University of Illinois*, 1998 WL 88341 (7th Cir. 1998); *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997). The Eleventh Circuit has never addressed whether an inquiry into whether Congress *could have* acted pursuant to another constitutional provision, is proper. If such an inquiry is proper, the Eleventh Circuit's pronouncement that Title VI was exclusively

enacted pursuant to the Spending Clause would not automatically bar this action under *Seminole Tribe*, because Congress *could have* acted pursuant to § 5 of the Fourteenth Amendment, a legitimate source of power pursuant to which state immunity may be abrogated. *See, e.g., Crawford*, 109 F.3d at 1282-84; *Franks*, 1998 WL 193177.

Second, even assuming *Seminole Tribe* applies, and even assuming that because Title VI is Spending Clause legislation, Congress has not validly abrogated a state's immunity under the Eleventh Amendment, a state may still waive its immunity, and the court finds that the Department has done so here.[38] *Seminole Tribe*, 517 U.S. at 63, 65; *Atascadero*, 473 U.S. at 238 n.1, 247; *Clark*, 123 F.3d at 1271; *Gomez*, 811 F.2d at 1038-39; *Beasley*, 1998 WL 136119 at *10.

Immunity may be waived, for example, when a state accepts federal funds and the funding statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247; *see also Clark*, 123 F.3d at 1271. In *Seminole Tribe*, "the Court recognized that the long-settled notion that states may voluntarily waive their immunity did not run afoul

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[38] To clarify, the court, relying on *Beasley*, found above that *Seminole Tribe* was inapplicable, and that under the Spending Clause Congress may validly require states to waive their immunity as a condition of receiving federal funds. This discussion of state waiver notes that even under *Seminole Tribe*, states may still waive their immunity.

of the principles of federalism upon which the holding in *Seminole Tribe* rested." *Beasley*, 1998 WL 136119 at *10.

Here, Title VI manifests a clear intent to condition a state's receipt of federal funds on its consent to waive its Eleventh Amendment immunity. Section 2000d-7 provides that "a State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of . . . title VI . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7. The Supreme Court has described § 2000d-7 as "an unambiguous waiver of the States' Eleventh Amendment immunity." *Lane*, 518 U.S. at 200. Accordingly, the court finds that because the Department accepts federal funds under Title VI, and "the spending clause does empower Congress to require that states waive their eleventh amendment immunity when they accept and use federal funds," *Beasley*, 1998 WL 136119 at * 11, in this action, the state has waived its immunity under the Eleventh Amendment. *See Clark*, 123 F.3d at 1271 (applying identical analysis).

To further complicate matters, Defendants also argue that assuming the Eleventh Amendment does not bar Plaintiffs' claims, § 2000d-7's abrogation of state immunity applies only to Title VI itself, and not to regulations enacted pursuant to § 2000d-1. (*See* Defs.' Post-Tr. Br. at 9.) Although no court has directly addressed this issue, several factors lead the court to conclude that the Eleventh Amendment does not operate as a bar to disparate impact causes of action. First, the court agrees with the Plaintiffs' observations that:

In enacting 42 U.S.C. § 2000d-7, there is no reason to think that Congress distinguished between action to enforce the Title VI statutory prohibition against intentional discrimination, 42 U.S.C. § 2000d, and the regulations prohibiting disparate impact discrimination. The Title VI regulations were issued pursuant to the directive to federal agencies contained in 42 U.S.C. § 2000d-1. The regulations are not separate and apart from the statute. Rather, they "effectuate the provisions of section 2000d," the statutory prohibition against discrimination. 42 U.S.C. § 2000d-1; *see Lau v. Nichols*, 414 U.S. 563, 566-569 (1974). By the time Congress passed 42 U.S.C. § 2000d-7, it had already "rebuffed efforts to overturn the Title VI disparate-impact regulations" and "with full awareness of how the agencies were interpreting Title VI, ha[d] modeled later statutes on § 601 of Title VI, thus indicating approval of the administrative definition." *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 593 n.14 (1983) (White, J.) Just as 42 U.S.C. § 2000d-7 abrogates Eleventh Amendment immunity for claims brought directly under the statute, so it abrogates immunity for claims brought pursuant to the disparate-impact regulations that effectuate the statute.

(Pls.' Supp. Post-Tr. Br. at 2-3.)

As noted in the court's private right of action analysis, above, and as Plaintiffs note, Title VI includes § 2000d-1, which specifically provides for the promulgation of rules and regulations to "effectuate the provisions" of Title VI. 42 U.S.C. § 2000d-1. These regulations,

including disparate impact regulations, are valid exercises of agency authority. *See Alexander*, 469 U.S. at 292-94.[39] As the *Alexander* Court noted:

> By the time Congress enacted the Rehabilitation Act in 1973 [the statute at issue there], nearly a decade of experience had been accumulated with the operation of the nondiscrimination provisions of Titles VI and VII. By this time, model Title VI enforcement regulations incorporating a disparate-impact standard had been drafted by a Presidential task force and the Justice Department, and every Cabinet Department and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs with a discriminatory impact. *See Guardians*, 463 U.S., at 629-630, 103 S. Ct., at 3247 (MARSHALL, J., dissenting). These regulations provoked some controversy in Congress, and in 1966 the House of Representatives rejected a proposed amendment that would have limited Title VI to only intentional discrimination. *Id.*, at 630-631, 103 S. Ct., at 3247-3248. Thus, when Congress in 1973 adopted virtually the same language for § 504 that had been used in Title VI, Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact

[39] Indeed, as the Eleventh Circuit noted in *Doe* and *Harris*, regulations could "further defin[e] and flesh[ ] out the content of the statutory right," as do, as the court has found, the disparate impact regulations at issue here. *See Doe*, 136 F.3d at 717; *Harris*, 127 F.3d at 1008-09. Further, as the Eleventh Circuit noted in *Floyd*, 133 F.3d at 791 n.9, "federal statutes *and regulations* may be modified and, therefore, change the liability attributable to a grant recipient." (emphasis added).

> discrimination. In refusing expressly to limit § 504 to intentional discrimination, Congress could be thought to have approved a disparate-impact standard for § 504. *See United States v. Rutherford*, 442 U.S. 544, 554, 99 S. Ct. 2470, 2476, 61 L. Ed.2d 68 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 698-699, 99 S. Ct. 1946, 1958-1959, 60 L. Ed.2d 560 (1979).

Alexander, 469 U.S. at 294 n.11.

Knowing of the existence of administrative disparate impact regulations at the time § 2000d-7 was contemplated and enacted, were it Congress' intent to maintain state immunity from disparate impact suits but abrogate immunity for suits under Title VI itself, it would have done so. *See Franklin*, 503 U.S. at 71 (noting that if Congress intend to deny a damage remedy, it would have done so, particularly "because Congress was legislating with full cognizance" of an earlier Supreme Court decision implicitly and contextually allowing a damage remedy); *Alexander*, 469 U.S. at 294 n.11. It did not, instead enacting a blanket abrogation of States' Eleventh Amendment immunity under Title VI, including § 2000d-1 which directs federal agencies to promulgate regulations effectuating the provisions and purposes of the statute. 42 U.S.C. § 2000d-1. Other courts have reached the same conclusion that § 2000d-7 abrogation applies to regulations enacted pursuant to Title VI as well. *See Grimes v. Sobol*, 832 F. Supp. 704, 707 (S.D.N.Y. 1993) ("Contrary to NYSED's erroneous assertion, it is not immune from suit where, as here, plaintiffs allege violations of Title VI and its regulations"), *aff'd* 37 F.3d 857 (2d Cir. 1994). The court finds that § 2000d-7 applies to disparate impact regulation enacted pursuant to § 2000d-1.

Defendants' citation to and reliance upon *Davis v. Monroe County Board of Education*, 120 F.3d 1390 (11th Cir. 1997) (en banc), in support of their argument that the Department failed to receive proper notice that it may be subject to suit under Title VI regulations, is misplaced. (*See* Defs.' Mot. For Leave To Submit Add. Auth.) *Davis* addressed the novel question of whether a school board could be held liable under Title IX for failing to prevent sexual harassment among students. *Id.* at 1392. The Eleventh Circuit examined whether the school board had adequate notice of possible liability to justify waiver of immunity under Title IX. The court's notice analysis went to whether the school board was on notice that "they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX." *Id.* at 1406. The Eleventh Circuit noted that:

> [In *Franklin*, 503 U.S. at 74-75,] [t]he Court stated that the plain language of Title IX imposes on schools a duty not to discriminate on the basis of sex, and when a school teacher sexually harasses a student, that teacher is discriminating on the basis of sex. *Id.* at 75, 112 S. Ct. at 1037. Appellant argues that a school employee is intentionally discriminating on the basis of sex when he or she fails to prevent one student from sexually harassing another. . . . Hence, appellant asserts that the school board here had sufficient notice, for purposes of the Spending Clause, that it could be held liable. We disagree. . . .
>
> The terms of Title IX gave educational institutions notice that they must prevent their

employees from themselves engaging in intentional gender discrimination. *See Franklin*, 503 U.S. at 75, 112 S. Ct. at 1037. Thus, school administrators cannot deny admission to female applicants because of their gender. *See Cannon*, 441 U.S. at 709, 99 S. Ct. at 1964. School administrators cannot discriminate against teachers on account of sex. *See North Haven Bd. of Educ.*, 456 U.S. at 530, 102 S. Ct. at 1922-23. Teachers cannot sexually harass their students. *See Franklin*, 503 U.S. at 74-75, 112 S. Ct. at 1037.

> The present complaint, however, does not allege that a school employee discriminated against [plaintiff] in any of the foregoing ways. The complaint does not allege, for example, that [employees] sexually harassed [plaintiff]. Rather, the complaint alleges that these individuals failed to take measures sufficient to prevent a non-employee from discriminating against [plaintiff]. We do not think that the Board was on notice when it accepted federal funding that it could be held liable in this situation.

Davis, 120 F.3d at 1400-01.

Title IX prohibits a school employee from discriminating on the basis of sex. *Franklin*, 503 U.S. at 75; *Davis*, 120 F.3d at 1399. *Davis* queried whether the rigorous notice requirements applicable to Spending Clause provisions were met when plaintiffs attempted to assert a claim that a school employee was discriminating on the basis of sex "when he or she fails to prevent one student from sexually harassing another." *Davis*, 120 F.3d at 1399. After noting that nothing in the language or legislative history of Title IX would support a claim for student-student liability, the court noted that "[i]n the absence of

any supporting legislative history, statutory construction of ambiguous language cannot support a finding of notice as required by the Spending Clause." *Id.* at 1401 n.15.

As the above passages show, *Davis*, in essence, concerned whether a school board was provided with sufficient notice of possible liability under a cause of action that was unsupported in the text or legislative history of Title IX. Here, in contrast, the question is whether the Department was on notice that it could be liable under established causes of action for violations of Title VI and its regulations. Plaintiffs do not seek to proceed under a heretofore untried theory of statutory construction. Rather, they merely assert that the Department's conduct creates an unjustified disparate impact on the basis of national origin, a cause of action long recognized. *See Elston*, 997 F.2d 1394; *Georgia State Conference*, 775 F.2d 1403. Accordingly, a much simpler question faces the court here than faced the court in *Davis*, and the only relevant portion of *Davis* to the case at bar is its recitation of the general rule that states must be aware of the conditions and consequences of accepting federal funds. *Davis*, 120 F.3d at 1399; *see also, Floyd*, 133 F.3d at 789.

"To ensure the voluntariness of participation in federal programs, the Supreme Court has required Congress to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding." *Davis*, 120 F.3d at 1399 (citing *Pennhurst*, 451 U.S. at 17). Spending power provisions "must read like a prospectus and give funding recipients a clear signal of what they are buying." *Id.* "By insisting that Congress speak with a clear voice, we enable the States to exercise

their choice knowingly, cognizant of the consequences of their participation." *Id.* (citing *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 398 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2434 (1997)).

Defendants cite *Davis* for the proposition that in this action, the Department did not receive unambiguous notice that "it must . . . provide tests for Class D driver's licenses in languages other than English so as to avoid discrimination on the basis of national origin." (Defs.' Mot. For Leave To Submit Add. Auth. at 3.) In this action, however, all *Davis*, and the cases cited therein require, are that the Department be aware of the fact that by accepting federal funds, it could be held liable for violations of Title VI or its regulations. *See generally, Davis*, 120 F.3d at 1399, 1401. In other words, the question is whether, when the Department accepted federal funds, it was on notice that it had to comply with, and could be held liable for, violations of Title VI and its regulations.

The contractual provisions in the record clearly state that the "applicant/recipient hereby agrees that, as a condition to receiving any Federal financial assistance from the Department of Transportation, it will comply with Title VI of the Civil Rights Act of 1964 . . . and applicable regulatory requirements." (*See* Pls.' Opp'n, Ex. 27 at 2, ¶ 11; *see also* Pls.' Tr. Ex. 27 at 4, ¶ 4.) Further, the court has already found that 42 U.S.C. § 2000d-7 clearly informs the Department of its lack of immunity. Finally, the court also notes that apart from the legal notice requirements, which have been met, the Department was advised that its English-only policy probably violated Title VI and the Equal Protection Clause via an official Attorney General's Opinion. The court finds that the

Department had the required notice that it could be liable for violations of Title VI and its regulations.

Davis does not hold, as Defendants would have the court read, that provisions must be placed in every disbursement of federal funds addressing every single state program or activity, under the gamut of Title VI, that is or may be in non-compliance with federal non-discrimination requirements. Indeed, both *Franklin* and *Davis* noted that the terms of Title IX "gave educational institutions notice that they must prevent their employees from themselves engaging in intentional gender discrimination." *Davis*, 120 F.3d at 1401 (citing *Franklin*, 503 U.S. at 75). A specific program by program review is nowhere mentioned. Nor does *Davis* require the federal government to notify the state of specific actions that must be taken to ensure compliance. Defendants cite no law, regulation, or holding of any court that a state agency or department is only subject to Title VI liability, in this context, if the state agency or department is told by the federal government that one of its specific programs or activities violated federal law, is given instructions to modify the program or activity and the extent of those modifications, and the department or agency then fails to comply with the federal government's requirements. Such a procedure is more akin to the termination of funding procedures mandated by 42 U.S.C. § 2000d-1 and interpretive case-law. As noted, private litigants cannot secure the termination of funding. Accordingly, the court declines to place such a notice requirement on the private litigants – only seeking injunctive relief – in the case at bar. The Department receives federal funds and as a condition of receiving those funds, agrees to comply with

Title VI and its regulations. The court finds that the Department was on notice that it was required to comply with Title VI's prohibition against discrimination based on national origin, as well as DOT and DOJ regulations, among others, prohibiting practices leading to an unjustified disparate impact on the basis of national origin.[40]

Whether the Eleventh Amendment bars Plaintiffs' claims against the Department, may, however, be a redundant issue. In *Cone Corp. v. Florida Dept. of Transp.*, 921 F.2d 1190, 1201 (11th Cir. 1991), highway construction contractors challenged Florida statutory and regulatory set-aside provisions by suing the Florida Department of Transportation ("FDOT") and its Secretary. Although the action was ultimately dismissed for lack of standing, the Eleventh Circuit addressed the jurisdictional posture of the case:

> [The plaintiffs sought relief under 42 U.S.C. §§ 1981, 1983 and 42 U.S.C. § 2000d (Title VI).] . . . the district court dismissed the section 1983 and section 1981 claims, finding that the

[40] The court finds it odd that the Department asserts the position that the federal government should micro-manage state programs and activities so as to ensure compliance with federal law. In essence, the Department's position is that when federal funds are disbursed, the federal government should review every single program of the Department to ensure compliance with federal non-discrimination laws and require modification of those programs that are or could be in non-compliance. The Department has given no indication that it has or will cease seeking federal funds, and, accordingly, in essence, is conceding that it would welcome federal micro-management of its activities.

> FDOT was immune from suit under the eleventh amendment of the United States Constitution. The court allowed plaintiffs to proceed against the FDOT on their section 2000d [Title VI] claim, however, under the express abrogation of eleventh amendment immunity found in 42 U.S.C. § 2000d-7(a)(1). We agree with the district court that section 2000d gives plaintiffs an implied private right of action against the FDOT and the Secretary.
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> . . .
>
> . . . although plaintiffs may sue both the Secretary and the FDOT under section 2000d, they may receive only declaratory and injunctive relief.[41] Their action against the FDOT is, therefore, redundant. The FDOT may act only through its human agents. If a court were to issue an injunction purporting to bind the FDOT, the Secretary would be responsible for ensuring that the agency obeyed the injunction, and would bear the risk of civil contempt proceedings to enforce its terms. . . . This opinion, accordingly, will refer to the Secretary as the sole defendant.

Cone Corp., 921 F.2d at 1201.

Further, in *Seminole Tribe*, the Supreme Court noted that even if Congress failed to properly abrogate States' immunity, "several avenues remain open for ensuring state compliance with federal law. . . . Most notably, an individual may obtain injunctive relief under *Ex parte*

[41] *But see Lane v. Pena*, 518 U.S. 187, 191 (1996) (noting that Title VI allows for monetary damage awards) (citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70 (1992)).

Young in order to remedy a state officer's ongoing violation of federal law." *Seminole Tribe*, 517 U.S. at 72 n.16; *see also Id.* at 71 n.14. As the Fourth Circuit recently noted in *CSX Transp., Inc. v. Board of Public Works of the State of West Virginia*, "[a]n injunction under the *Ex parte Young* doctrine may provide the [plaintiffs] with complete relief regardless of whether the state is immune from suit under the Eleventh Amendment." 1998 WL 100394 *4 (4th Cir. 1998). And in *Kimel v. State of Florida Board of Regents*, 1998 WL 210593 (11th Cir. 1998), although the Eleventh Circuit held that the Eleventh Amendment barred private suits against states under the ADEA, it noted that "[t]he ADEA is enforceable against the States, despite sovereign immunity, through forms of relief other than direct suits by citizens in federal court." The *Kimel* court cited to note 14 in *Seminole Tribe* for support. *Id.* at *4; *see also Id.* n.13 ("For examples of other methods of ensuring the States' compliance with federal law, *see Seminole*, 517 U.S. at 71 n.14"); *Clark*, 137 F.3d at 1271.

Seminole Tribe, Cone Corp., CSX Transp., Clark and *Kimel* establish that in this action, even if the Department is immune from suit, its Director, in his official capacity, is not. Accordingly, the court now turns to the Department's Director, sued in his official capacity. As a general rule, "the Eleventh Amendment insulates states from suit in Federal court," *Welch v. Laney*, 57 F.3d 1004, 1008 (11th Cir. 1995), however, it "does not insulate state officials acting in their official capacities from suit in federal court, at least to the extent the complainant seeks prospective injunctive relief." *Id.*

This exception to the general rule that the Eleventh Amendment bars suit in federal court unless the state

consents or Congress clearly expresses its intent to abrogate immunity, *see Seminole Tribe*, 517 U.S. at 53-54; *Pennhurst*, 465 U.S. at 99, was formulated in *Ex parte Young*, 209 U.S. 123 (1908). There, the Supreme Court held that the Eleventh Amendment does not bar a federal court from enjoining an unconstitutional action by a state official, even though the state may be immune, because the state does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Id.* at 160; *see also Schrenko*, 109 F.3d at 690 (citing *Milliken v. Bradley*, 433 U.S. 267, 289 (1977)); *see further Lassiter v. Alabama A & M Univ.*, 3 F.3d 1482, 1485 (11th Cir. 1993) ("[The] Eleventh Amendment does not insulate official capacity defendants from actions seeking prospective injunctive relief"); *Wu v. Thomas*, 863 F.2d 1543, 1549-50 (11th Cir. 1989), *reh'g and reh'g en banc denied* March 8, 1989 ("The eleventh amendment does not . . . bar suits for equitable relief against state officers in their official capacity. . . . "); *Cross v. State of Alabama, State Department of Mental Health & Mental Retardation*, 49 F.3d 1490, 1503 (11th Cir. 1995) (noting same).[42] The *Ex*

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[42] Congress' express abrogation of the states' Eleventh Amendment immunity in § 2000d-7 may itself abrogate any official capacity immunity asserted by a state official. The Ninth Circuit has noted that "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess." *Duffy v. Riveland*, 98 F.3d 447, 452 (9th Cir. 1996) (citing *Kentucky v. Graham*, 473 U.S. 159, 167 (1985)). Thus, Congress's abrogation of the states' Eleventh Amendment immunity from suit under Title VI similarly precludes assertion of immunity by state officials sued in their official capacity. *Id.*; *see also Pena v. Gardner*, 976 F.2d 469, 473 (9th Cir. 1992) ("An official sued in his official capacity has the same immunity as the state . . . ").

parte Young exception applies to violations of both federal statutory and constitutional rights. *See, e.g., Natural Resources Defense Council v. California Dept. of Trans.*, 96 F.3d 420, 422 (9th Cir. 1996).

This exception is narrow, and is tailored to preventing ongoing violations of federal law rather than compensating injuries caused by past violations. *Papasan v. Allain*, 478 U.S. 265, 278 (1986). As the Supreme Court explained the exception, "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citations omitted). Consequently, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *see also Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

This exception, by extension, permissibly leads to ancillary expenditures of funds from state treasuries where the fiscal consequences are "the necessary result of compliance with decrees which by their terms were prospective in nature." *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). What the Eleventh Amendment does bar, are suits seeking compensation for past injuries caused by past violations of federal law by a state official, whether that compensation is characterized as damages, equitable restitution, or something else. *See Papasan*, 478 U.S. at 278;

Should the Department maintain its Eleventh Amendment immunity, however, *Ex parte Young* would still apply, and Director Hagan, in his official capacity, would not be immune from a suit requesting declaratory and injunctive relief.

Green, 474 U.S. at 69-70. Accordingly, courts must discern whether the relief requested is prospective or retrospective in nature and whether monetary damages are sought.

In the case at bar, Plaintiffs are seeking declaratory and injunctive relief against the Department and its Director; no monetary damages are sought for past violations. Consequently, the Supreme Court's concerns in *Papasan* are not implicated, and this action falls squarely within the *Ex parte Young* exception. *Cf. Schrenko*, 109 F.3d at 691. Accordingly, the court finds that this action is not, in essence, "one for recovery of money from the state," that "the state is [not] the real, substantial party in interest," and, consequently, it "is [not] entitled to invoke its [Eleventh Amendment] immunity from suit. . . ." *Schrenko*, 109 F.3d at 690 (citing *Pennhurst*, 465 U.S. at 101; *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945)). The court finds that the Eleventh Amendment does not bar Plaintiffs' claims against Director Hagan in his official capacity.

C. Findings Of Fact And Conclusions Of Law

1. Legal Framework

Having cleared the procedural hurdles, the court now turns to the merits of this action. Plaintiffs' claims are brought solely on a disparate impact theory. (*See* Pls.' Opp'n at 31.) Courts analyzing Title VI disparate impact claims have looked to elements developed under Title VII for guidance. *See, e.g., New York Urban League*, 71 F.3d at 1036; *City of Chicago v. Lindley*, 66 F.3d 819, 829 (7th Cir. 1995); *Elston*, 997 F.2d at 1407 n.14; *Larry P. v. Riles*, 793

F.2d 969, 989 nn. 9, 10 (9th Cir. 1984); *Georgia State Conference*, 775 F.2d at 1417; *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1331 (3d Cir. 1981) (en banc). Recent Eleventh Circuit decisions, however, have called into question the use of Title VII's disparate impact framework in Title VI disparate impact analyses.

In *Floyd v. Waiters*, 133 F.3d 786, 790 n.5 (11th Cir. 1998) and *Davis v. Monroe County Board of Education*, 120 F.3d 1390, 1400 n.13 (11th Cir. 1997), the Eleventh Circuit questioned whether Title VII's framework should be utilized to resolve questions of liability under Title IX. As noted, Title IX and Title VI analyses are generally consistent. *See Floyd*, 133 F.3d at 790 n.5. In both *Floyd* and *Davis*, however, the Eleventh Circuit examined standards of vicarious liability for sexual harassment, and concluded that Title VII sexual harassment standards were incompatible with Title IX, in part because of the different language of the statutes and the different constitutional bases for each statutes' enactment. *See Id.; Davis*, 120 F.3d at 1400 n.13.

In *Elston*, 997 F.2d at 1407 n.14 (1993) and *Georgia State Conference*, 775 F.2d at 1417 (1985), in contrast, the Eleventh Circuit expressly utilized Title VII's disparate impact framework in analyzing Title VI disparate impact claims brought pursuant to § 2000d-1 disparate impact regulations. "The law in this circuit is emphatic that 'only a decision by this court sitting en banc or the United States Supreme Court can overrule a prior panel decision.' " *United States v. Kaplan*, 133 F.3d 826, 831 (11th Cir. 1998) (quoting *United States v. Woodard*, 938 F.2d 1255, 1258 (11th Cir.1991) (per curiam) (quoting *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir.1986))). It is not

clear that *Floyd* and *Davis* are applicable to this action given the unique nature of those cases; there the Eleventh Circuit examined whether liability should be imputed to school boards/districts. And, *Elston* and *Georgia State Conference* are directly on point. Accordingly, the court will utilize the Title VII disparate impact framework explicitly outlined in *Elston* and *Georgia State Conference*. *Elston*, 997 F.2d at 1407; *Georgia State Conference*, 775 F.2d at 1417; *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *but see Godby v. Montgomery County Board of Education*, 1998 WL 119956, *22 n.17 (M.D. Ala. 1998) (declining to apply Title VII framework in Title VI case because of *Floyd*).

To bring a viable cause of action under disparate impact regulations enacted pursuant to Title VI, Plaintiffs must establish by a preponderance of the evidence that they are members of a class protected by the statute and that defendants have promulgated a facially neutral practice that has a disproportionate adverse effect. *See Elston*, 997 F.2d at 1407 (citing *Georgia State Conference*, 775 F.2d at 1417). If the plaintiff makes such a prima facie showing, the defendant must then prove that there exists a "substantial legitimate justification" for the practice in order to avoid liability. *Id.* To do so, the defendant must show that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral to the defendant's institutional mission." *Id.* at 1413. The justifications must bear a "manifest demonstrable relationship" to the challenged policy. *Id.* at 1412 (citing *Georgia State Conference*, 775 F.2d at 1418). If the Defendants meet this burden, the Plaintiffs may still prevail by

offering a comparably effective alternative practice which results in less disproportionality or by showing that the proffered justifications are actually a pretext for discrimination. *Id.*

2. Plaintiffs have established by a preponderance of the evidence that they are members of a class protected by the statute and that Defendants have promulgated a facially neutral practice that has a disproportionate adverse effect

   a. Plaintiffs are members of a class protected by the statute

The crux of this case is whether discrimination on the basis of language can lead to an unjustified disparate impact on the basis of national origin, and thus lead to a violation of Title VI.

Defendants argue that "[t]he English-only policy distinguishes between those who speak English and those who do not. This classification is not based on national origin, so plaintiffs' claims under . . . the Civil Rights Act . . . fail." (Defs.' Mot. at 4; *see also* Defs.' Resp. at 2.) Defendants are correct in noting that the policy discriminates on the basis of language, and if Plaintiffs were alleging intentional discrimination, their argument would perhaps have some merit.[43] However, Plaintiffs' claims

[43] Plaintiffs could of course, show that discrimination on the basis of language was a pretext for discrimination on the basis of race, color or national origin. They could also show, as they have done here, a comparably effective alternate practice. *See Elston*, 997 F.2d at 1407.

are brought under a disparate impact theory. Intent to discriminate need not be shown. Therefore, the fact that the policy is facially neutral in relation to race, color or national origin, is not relevant to the question of whether the policy has a "disproportionate adverse effect" on the basis of race, color, or, as in this case, national origin. *See Elston*, 997 F.2d at 1407 (citing *Georgia State Conference*, 775 F.2d at 1417).

Defendants also argue that:

> Language is not equivalent to national origin, and the plaintiffs cannot make it so by affidavit. A showing that one of the plaintiffs speaks Spanish does not show which country that plaintiff is from. Is the Department discriminating against that plaintiff because she is from Spain? Mexico? Argentina? or one of a number of other nations? Conversely, some applicants who do not appear to speak English fluently, nonetheless, pass the English-language examination. . . . The classification does not distinguish on the basis of language per se, but rather on the basis of something else. Plaintiffs assert that the "something else" is language proficiency but knowledge of the tested material may also be at work and cannot be excluded.

(Defs.' Reply at 13.) Plaintiffs' reply, which the court adopts as part of its opinion, asserts that:

> First, the defendants suggest that the plaintiffs' claim is somehow infirm because they have not precisely identified the foreign countries whose natives are adversely affected by the English-only policy. Second, the defendants claim that because at least some persons who do not appear to speak English fluently may actually

pass the driver's license exam, the policy does not have a disparate impact. Third, the defendants speculate that something other than a lack of proficiency in English may be the real cause of the difficulty that non-English speaking persons have with the test. None of these arguments has any merit.

English-only rules typically have a disparate impact on the basis of national origin. *See, e.g.*, 29 C.F.R. § 1606.7(a) (EEOC regulations) (English only rules limit "opportunities on the basis of national origin");[44] 24 C.F.R. Part 100, App. B at IV. L & M, V.D., VI.B (Department of Education guidelines requiring accommodation of persons with limited English skills in vocational programs receiving federal financial assistance to prevent discrimination on the basis of national origin under Title VI). The fact that the plaintiffs have not identified the particular country of origin of every person who cannot get drivers' licenses as a result of the defendants' English-only rule is not a bar to their claim. There is no dispute over the fact that persons who are not fluent in English are much more likely than those who are fluent to have been born in a foreign country. Whether persons who are fluent only in Spanish are natives of Spain, Mexico, or Argentina, to borrow the defendants' hypothetical (*see* Defendants' Reply at 13), is irrelevant. Whatever foreign country they may be from, an English-only rule would

[44] In determining whether a practice has a disparate impact under Title VI, courts have routinely looked to employment cases decided under Title VII for guidance. *See, e.g., Georgia State Conference of Branches of NAACP v. State of Georgia*, 743 F.2d 1403, 1417, 1421 (11th Cir. 1985). [Plaintiffs' Footnote 1].

have a disparate impact on the basis of their national origin.[45]

Contrary to the defendants' view, the fact that "some applicants who do not appear to speak English fluently . . . pass the English-language examination," Defendants' Reply at 13, does not mean that the English-only rule does not have a disparate impact. Disparate impact occurs when a seemingly "neutral practice detrimentally affects" a protected group "to a greater extent than" others. *Georgia State Conference of Branches of NAACP v. State of Georgia*, 775 F.2d at 1421. The fact that *some* members of a protected group are not screened out by the practice does not mean that the practice does not have a disparate impact.[46] A simple example

[45] As outlined below, the testimony of the named Plaintiff, Martha Sandoval, as well as the testimony of Lorenzo Leon, Brenda Bullock and Floria Salazar, among others, established the concrete link between national origin and the lack of English skills. Their testimony, in essence, established, by a preponderance, that the majority of non-English speakers in the state of Alabama are natives of a foreign country.

In addition, Dr. Bogie, Plaintiffs' demographics expert, testified that in Alabama, approximately forty-one percent of non-English speakers are Hispanic and twenty-three percent are Asians and Pacific Islanders. (Pls.' Opp'n, Ex. 19, Bogie Report at 2.)

[46] Defendants ignore the fact that many non-English speaking applicants cannot even attempt the written examination because of their inability to speak English. While knowledge of the subject matter, is, of course, relevant to whether an applicant passes the examination, the Plaintiffs have shown, as discussed below, that regardless of an applicant's proficiency with the subject matter of the examination, many non-English speakers cannot take the examination because it is offered solely in English.

proves the point. If a police department were to adopt a rule requiring officers to be 6 feet tall, the fact that some women could meet the height requirement would not imply that the requirement does not have a disparate impact on women.

The defendants also claim that the fact that some persons pass the examination despite their apparent limited English proficiency suggests that something else other than the English-only policy – something like inadequate test preparation – may be the true reason why non-English speaking persons cannot pass an English-only test. Defendants' Reply at 13. Assuming that this contention is a serious one, it is sufficient at this stage to point out that the plaintiffs have submitted evidence that the defendants' English-only policy impedes the ability of persons who are not fluent in English to pass the drivers' license examination. Although the defendants will be free to present evidence at trial that something other than a lack of fluency in English is the reason why non-English speaking persons do not pass an exam given only in English (plaintiffs eagerly await such remarkable proof), their speculation about the matter cannot be a basis for granting summary judgment.[47]

(Pls.' Supp. at 3-5.)

The Defendants' argument is flawed for additional reasons. First, under the Defendants' analysis, if the Department had promulgated a policy stating, for example, that Norwegian speakers could not obtain driver's

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[47] The Defendants presented no such evidence at trial.

licenses unless they spoke English, the disparate impact based on national origin would be discrete and readily identifiable. Because only Norway utilizes Norwegian as its official language, one could readily discern a disparate impact on Norwegians, and in turn, an unjustified disparate impact on the basis of national origin. Just because the country of origin of those effected [sic] by the English-only policy is not readily identifiable, does not mean that a disparate impact does not exist. Conversely, the fact that individuals from a multitude of foreign nations are effected [sic] by the English-only policy shows its far-reaching discriminatory impact.

Second, the Defendants seek to frame the analysis as whether language equals national origin, arguing that it does not. (Interestingly, although Defendants argue that language is not a proxy for national origin, in at least one instance, the Department has viewed it as such. *See, infra,* page 111). The correct analysis, however, is not whether language equals national origin, but whether the policy of the Department, (here a policy based on language), has an unjustified disparate impact on the basis of national origin. The court would apply the same analysis for any policy enacted by the Department challenged under Title VI. It is not the nature of the policy that is examined, but its effect. If its effect is an unjustified disparate impact on the basis of race, color, or national origin, the policy violates Title VI. *See Vialez v. New York City Housing Authority,* 783 F.Supp. 109, 124 n.15 (S.D. N.Y. 1991) (noting that test is effect of policy rather than its provisions).

Although the court looks to the policy's effect rather than solely to its terms, the court's finding that the English-only policy has an unjustified disparate impact

on the basis of national origin is bolstered by the multitude of cases that find a strong nexus between language and national origin. Although no court has explicitly held that language is a proxy for national origin, in the equal protection context, the Supreme Court has recognized that language may serve as an adjunct for an immutable characteristic: "It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." *Hernandez v. New York*, 500 U.S. 352, 371-72 (1991). And, the Supreme Court and many lower courts have recognized the significant overlap and inherent correlation between language and national origin. *See, e.g. Lau*, 414 U.S. at 568-69 (holding that failure to provide educational assistance to non-English-speaking students constituted national origin discrimination under Title VI); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92-93 & n.5 (1973) (in finding no evidence of discrimination against persons of Mexican national origin, the Court noted there was "no suggestion, for example, that the company refused to hire aliens of Mexican or Spanish-speaking background while hiring those of other national origins"); *Hernandez v. Texas*, 347 U.S. 475, 480 n.12 (1954) ("just as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class" of Mexican-Americans); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926) (invalidating ordinance requiring that accountant records of businesses be kept in English, Spanish, or local dialects of the Philippines, thereby excluding the use of Chinese); *Farrington v. Tokushigu*, 273 U.S. 290, 298 (1926) ("the Constitution protects [the Japanese] as well as those

who speak another tongue"); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (noting the fundamental individual right of choice of language); *Ynigez v. Arizonans For Official English*, 69 F.3d 920, 948 (9th Cir. 1996) ("Since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment"), *vacated on other grounds*, 520 U.S. 43 (1997); *Odima v. West Tucson Hotel Co.*, 991 F.2d 595, 601 (9th Cir. 1993) ("accent and national origin are obviously inextricably intertwined"); *United States v. Alcantar*, 897 F.2d 436, 440 (9th Cir. 1990) (recognizing "how closely tied Spanish language is to Hispanic identity"); *Fragante v. City and County of Honolulu*, 888 F.2d 591 (9th Cir. 1989) (holding accent discrimination may be actionable as national origin discrimination under Title VII, citing, with approval, EEOC guidelines defining national origin discrimination to include discrimination based on the "linguistic characteristics of a national origin group"), *cert. denied*, 494 U.S. 1081 (1990); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1039 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989) (noting that "the cultural identity of certain minority groups is tied to the use of their primary tongue," and that "rules which have a negative effect on . . . non-English speakers, may be mere pretexts for intentional national origin discrimination"); *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815 (10th Cir. 1984) (finding that adverse employment decision based on Filipino accent constitutes national origin discrimination); *Berke v. Ohio Dep't of Pub. Welfare*, 628 F.2d 980 (6th Cir. 1980) (per curiam) (holding that refusal to hire woman with Polish accent violated Title VII); *Craig*

v. County of Los Angeles, 626 F.2d 659, 661 n.1 (9th Cir. 1980) (plaintiff class defined by district court as "Spanish-Surnamed" or "Spanish Language" persons), *cert. denied*, 450 U.S. 919 (1981); *United States v. Uvalde Consol. Indep. School Dist.*, 625 F.2d 547, 553 (5th Cir. 1980) ("the fourteenth amendment clearly extends to protection of any group of persons invidiously discriminated against by state law including groups identifiable by ethnic, national origin, or linguistic characteristics"); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) ("To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth"); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979) (recognizing "Spanish speaking or Spanish-surnamed Americans as a minority for purposes of sections 1981, 1983 and 1985(3)"); *Smothers v. Benitez*, 806 F.Supp. 299 (D.P.R. 1992) (discussing equal protection analysis of language based discrimination); *Asian Am. Business Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989) (holding that ordinance restricting use of foreign languages on business signs "overtly discriminates on the basis of national origin"); *Saucedo v. Brothers Well Service, Inc.*, 464 F.Supp. 919 (S.D. Tex. 1979) (holding that Speak-English-Only rule violated Title VII because defendant could not show business necessity and uniform enforcement); *Hernandez v. Erlenbusch*, 368 F.Supp. 752 (D. Or. 1973) (finding that a tavern's rule against speaking foreign languages amounted to racial discrimination against Mexican-Americans); *Castro v. Beecher*, 334 F. Supp. 930, 934 n.2 (D. Mass. 1971) (definition of class of "Spanish surnamed persons"

encompassed those "whose primary language is Spanish"), *aff'd in part, rev'd in part*, 459 F.2d 725 (1st Cir. 1972); *Ruiz v. Hull*, 1998 WL 203081, *15-18 (Ariz. April 28, 1998) (holding that State Official English Law violated the First Amendment and the Fourteenth Amendment's guarantee of Equal Protection, under a strict scrutiny analysis, "because it impinges upon both the fundamental right to participate equally in the political process and the right to petition the government for redress").

In *Lau v. Nichols*, 414 U.S. 563 (1974), a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. *Id.* at 564-566. No intentional discrimination was shown. Nevertheless, the Supreme Court upheld a federal disparate impact regulation applicable to public school systems receiving federal funds that prohibited the utilization of "criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." *Id.* at 568. Essentially, the Court held that the failure of the San Francisco school system to provide English-language instruction to students of Chinese ancestry who did not speak English, or to provide them with instruction in Chinese, constituted a violation of Title VI. The Court in *Lau* clearly struck down an English-only language policy as violative of Title VI because it resulted in an unjustified disparate impact on non-English speakers.

Further, as Plaintiffs' passage adopted by the court above discloses, federal agency regulations and guidelines frequently equate linguistic characteristics with national origin. *See* 29 C.F.R. § 1606.7(a) (EEOC regulations) (English only rules limit "opportunities on the basis of national origin"); 24 C.F.R. Part 100, App. B at IV. L & M, V.D., VI. B (Department of Education guidelines requiring accommodation of persons with limited English skills in vocational programs receiving federal financial assistance to prevent discrimination on the basis of national origin under Title VI); Pls.' Supp. Auth, Ex. 1, U.S. Dept. of Health and Human Services' Office of Civil Rights Memorandum entitled "Title VI Prohibition Against National Origin Discrimination – Persons with Limited-English Proficiency" (stating that discrimination on the basis language may violate Title VI's prohibition of discrimination based on national origin).

Finally, statistics demonstrate the correlation between national origin and language. For example, approximately ninety-seven percent of individuals who speak Spanish are Hispanic. *See* Memullen, *The "Official English" Movement And The Demise Of Diversity: The Elimination Of Federal Judicial And Statutory Minority Language Rights*, 32 Land & Water L. Rev. 789, 813 (1997) (citing Estrada, Leonardo F., *The Extent of Spanish/English Bilingualism in the United States*, 15 Aztlan Int'l J. Chicano Stud. Res. 379, 381 (1984); *Statistical Record of Asian Americans* (Susan B. Gall & Timothy L. Gall eds., 1983)). And, for Asians and Pacific Islanders, one researcher has noted that:

> the correlation between language and national origin is also very high. As of 1989, 72.5% of

> Chinese Americans speak a language other than English at home. Comparable figures for other Asian Pacific Islander groups exist for Cambodians (81.9%), Vietnamese (80 .7%), Laotians (77.4%), Thai (72.5%), Koreans (69.7%), Filipinos (59.9%), Indians (55.3%), and Japanese (40.5%).

See Chen, Edward M., *Garcia v. Spun Steak Co.: Speak-English-Only Rules And The Demise Of Workplace Pluralism*, 1 Asian L.J. 155, 165 (citing Gall, *Statistical Record of Asian Americans*, and 1990 census data). As Mr. Chen perceptively noted, "in one respect, the relationship between language and ethnicity is more specific for Asian Pacific Islanders than for Latinos. Given the myriad of Asian languages, each peculiar to a particular country of origin, language is an integral part of an Asian Pacific Islander's specific national origin identity." *Id.* These statistics are reflected in Alabama's population: In the 1990 census, Hispanics comprised the largest number of adults who did not speak English well or at all, and Asians and Pacific Islanders comprised the next largest group. (*See* Pls.' Opp'n, Ex. 19, Bogie Aff.; Bogie Test.)

In this action, as further outlined below, Plaintiffs have produced substantial evidence establishing that the Department's English-Only policy discriminates on the basis of national origin. The evidence establishes that the vast majority of those falling within the regulation's provisions are from a country of origin other than the United States. Many of the cases cited above that noted a nexus between language and national origin were also cited by the Plaintiffs in their pleadings. Based on the evidence and case-law proffered in Plaintiffs' pleadings, as well as

the evidence produced at trial, the court finds that Plaintiffs have met their burden of establishing, by a preponderance of the evidence, that Plaintiffs are members of a class protected by the statute. *See Elston*, 997 F.2d at 1407 (citing *Georgia State Conference*, 775 F.2d at 1417). That class is made up of "all legal residents of the State of Alabama who are otherwise qualified to obtain a Class D private vehicle driver's license but cannot do so because they are not sufficiently fluent in English." (*See* Oct. 17, 1997 Order.)

b. The Defendants have promulgated a facially neutral practice that has a disproportionate adverse effect[48]

To obtain an Alabama driver's license, a new applicant must go through four distinct steps. First, the applicant must fill out an application and provide appropriate identification to the examiner. Second, the applicant must pass a vision examination. Third, the applicant must pass a written examination that tests an applicant's knowledge of traffic signs and the rules of the road. Finally, an applicant must pass a performance examination where their driving skills are evaluated. Driver's License examinations are administered by the Alabama Department of Public Safety's Driver's License Division. The Driver's License Division has seven district offices and a total of

[48] The policy is facially neutral in only that it does not explicitly classify individuals on the basis of race, color or national origin.

approximately eight-five full and part-time offices where driver's license examinations are given.

For the purposes of this Memorandum Opinion, applicants for driver's licenses may be fairly broken down into four major categories: (1) applicants who, for the purposes of the examinations, have little or no problem reading, writing, or speaking English; (2) applicants who, for the purposes of the examinations, can speak English, but cannot read or write English (illiterate applicants);[49] (3) applicants who, for the purposes of the examinations, are handicapped (including those applicants that are deaf); and (4) applicants who cannot, for the

[49] On February 12, 1996, the Governor of Alabama issued Executive Order 15 which stated that "adult illiteracy has grown to alarming proportions in Alabama, with some 931,180 adults lacking a high school diploma or GED, and some 456,278 adults who are functionally illiterate (performance below the 9th grade level). . . . and, . . . Alabama ranks as one of the four states having the lowest high school graduation rates in the nation." (*See* Pls.' Mot. To Supp. Record, Ex. 33 (Executive Order 15).) With an approximate adult population of 2,680,255, this means that approximately 34.7% of Alabama's adults do not have a high-school diploma or equivalent, and approximately 17% are "functionally illiterate." (*Id.*)

Defendants contend that according to the 1990 census, the voting age population of Alabama was 2,981,799. (*See* Defs.' Supp. To Record at 1.) Utilizing Defendants' statistics, 31.2% of Alabama's adults lack a high school diploma or its equivalent, and 15.2% are functionally illiterate.

Whatever data is utilized, however, it is clear that not only does Alabama's educational system fail to adequately provide for a significant portion of its population, but that a significant portion of those seeking driver's licenses, for whom English is their native language, may require special accommodation during the examination process.

purposes of the examinations, speak, read or write English.[50]

As explored below, it is undisputed that the State of Alabama, through both official policy and practice, provides substantial assistance to illiterate English speaking applicants and to handicapped applicants, including those applicants that are deaf. In sharp contrast, the State of Alabama renders no aid whatsoever to those applicants who, for the purposes of the examinations, cannot speak, read and/or write in English. In fact, Alabama's official policy is that all Driver's License Examinations must be administered only in English.[51]

i. Implementation and review of the Department's English-Only Policy

On July 13, 1990 the Alabama Legislature ratified Amendment 509 to the Alabama Constitution of 1901. Amendment 509 provides:

ENGLISH AS OFFICIAL
LANGUAGE OF STATE.

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[50] In 1980, approximately 4,287 Alabama residents reported that they did not speak English well or at all. (*See* Pls.' Tr. Ex. 19 (*citing* 1980, 1990 Census (18+).)) That number rose to 10, 158 in 1990 and is projected to reach 24,069 by 2000. (*Id.*; *see also* Defs.' Mot. To Supp. Record, Ex. 7 (1990 census data).) As Plaintiffs' expert Dr. Bogie testified, these numbers are probably low because of the documented census undercount.

[51] As explored below, evidence introduced at trial shows that some districts or divisions within the Department allow the use and possession of a translation dictionary in direct contravention of official policy.

English is the official language of the state of Alabama. The legislature shall enforce this amendment by appropriate legislation. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama.

Any person who is a resident of or doing business in the state of Alabama shall have standing to sue the state of Alabama to enforce this amendment, and the courts of record of the state of Alabama shall have jurisdiction to hear cases brought to enforce this provision. The legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this amendment.

Ala. Const. Amend. 509.

At the time the Amendment passed, the Alabama Department of Public Safety administered written driver's license examinations in approximately fourteen foreign languages.[52] Additionally, former Assistant

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[52] A survey conducted by the Plaintiffs found that forty-eight other states and Washington D.C. "make some kind of accommodation for non- English-speaking applicants, either br providing written, automated or audio tests in foreign languages, offering a picture test . . . , or by allowing applicants to use interpreters or translation aids." (*See* Pls.' Tr. Ex. 21 at 1.) In the southeast region of the United States, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Tennessee, Texas, and South Carolina all administer their

Director of the Department Lieutenant Colonel Harold Hammond testified at trial that during his tenure as Acting Director from 1989 to 1991, the Department would attempt to develop new foreign language examinations if the demand was great enough, and that translations of the English examinations[53] into various foreign languages were done at no cost to the Department.[54] (*See also* Pls.' Opp'n, Ex.1, pp. 24, 30-31 (Hammond Dep.) (no cost for translations).) Colonel Hammond also testified that: (1) the Department did not experience any significant problems in administering foreign language examinations; (2) there was no evidence that non-English speakers were more likely to cheat on the written examination or otherwise compromise the examination's integrity; and (3) there was no evidence that non-English speakers caused

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driver's license examination in languages other than English. (*Id.* at 2.) The Defendants did not object to the introduction of this survey into the evidentiary record.

[53] Both the record before the court and evidence produced at trial show that the English examination is given in six different formats. From a pool of certified questions, a certain number are selected and placed in various orders to create the six different examinations.

[54] Colonel Hammond testified that from 1987 to 1991, the Department actually expanded its use of foreign language examinations. In addition, then Major Hammond served as the Chief of the Driver's License Division from 1978 to 1987. The policy and practice of giving examinations in foreign languages was in place when he became Chief of the Driver's License Division. He has also served in various other positions within the Department of Public Safety since 1959. (*See also* Pls.' Opp'n, Ex. 1, Hammond Dep. at 8.)

more accidents or posed a greater safety risk than English speakers.[55]

In December of 1991 the Department issued "Driver License Policy Order No. 40." (Pls.' Tr. Ex. 7.) The Policy Order cited Amendment 509 as its source, and stated that "[i]t is the policy of the Director and the Driver License Division that all driver license examinations will be printed and administered in English."[56] (*Id.*) At approximately the same time, the Department also revised its Examiner's Guide – the main reference used by driver's license officials and examiners in performing their duties. (Pls.' Tr. Ex. 1.) As revised, the Examiner's Guide provided in pertinent part that:

> Amendment Number 509 to the Constitution of the state of Alabama states, "English is the official language of the state of Alabama." To ensure the role of English as the official and common language of the state of Alabama is preserved and enhanced, all driver license examinations will be printed and administered in English.

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[55] The substance of Colonel Hammond's testimony is bolstered by the deposition testimony of Major Ralph Cottingham – Chief of the Department's Driver's License Division from 1989 to 1994. (*See* Pls.' Opp'n, Ex. 2 at 40-41 (Cottingham Dep.).)

[56] Although neither Party offered evidence of the total annual foreign language examinations given prior to the implementation of the Department's English Only Policy, the Huntsville and Mobile District Offices combined gave approximately five thousand foreign language examinations annually. (*See* Pls.' Tr. Ex. 12.)

> If an interpreter is present allow them to interpret the eye examination and application questions asked by the examiner. However, at no time will an interpreter assist the applicant on the knowledge examination.

(Pls.' Tr. Ex. 1.) The current Examiner's Guide, however, does not allow for the use of an interpreter during the vision examination. It provides in pertinent part that:

> No interpreters will be allowed to participate in any portion of the examination, to include, vision examination, written examination, oral examination, or driving skills examination.

(Pls.' Tr. Ex. 6.) This total prohibition on the use of interpreters was reiterated in a January 26, 1996 memorandum from then Chief Examiner of the Driver's License Division of the Department of Public Safety Captain Roscoe Howell. (*See* Pls.'s Opp'n, Ex. 4.) The memorandum was to "All District Commanders," and was in reference to "Foreign Examinations." (*Id.*) The memorandum stated that "[a]t no time will an interpreter be allowed to assist the applicant with any portions of the driver license testing process."[57] (*Id.*)

In addition, official policy is that applicants are not allowed to use dictionaries during the written examination. Even though the Department's Examiner's Guide

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[57] Arguably, the current Examiner's Guide and Captain Howell's January 26, 1996 memorandum would also prohibit the use of interpreters during the application process in addition to all three of the examinations.

allows the use of a dictionary under limited circumstances,[58] Captain Howell's January 26, 1996 memorandum states that "[a]t no time will any applicant, foreign or domestic, be allowed to use a dictionary or any type of printed reference material in taking the examination." (*Id.*) Interestingly, the Examiner's Guide, quoted in note 58, provides that a dictionary may be utilized by "any

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[58] The Examiner's Guide provides that:

> Any individual, regardless of nationality, may at the time of the written examination provide the Driver License Examiner with a dictionary to be used during the examination. The dictionary may be used as a reference guide but not as a translation guide.
>
> During the written examination, the dictionary is to be maintained under control of the Driver License Examiner, it is not to be maintained by the applicant during the test.
>
> Prior to the beginning of the written examination, the Driver License Examiner is to inspect the dictionary to ensure that there is no handwriting, printed materials not a part of the dictionary, or any other marks, objects, or signs that are not part of the bound and printed dictionary.
>
> No hand written dictionaries will be permitted.
>
> . . .
>
> Use of the dictionary is not permitted during the driving skills examination. This is not to preclude instructions administered in a foreign language prior to the actual examination with our Department. The applicant must be able to understand and communicate with the Driver License Examiner. This ability to communicate is required for the safety of the Driver License Examiner, applicant, pedestrians, and other motoring public.

(Pls.' Tr. Ex. 6 at 42-43.)

individual, regardless of *nationality;*" here, the Defendants themselves utilize language as a proxy for nationality.

Despite the official prohibition of the use of interpreters and dictionaries during examinations, representatives of the Department testified at trial that in practice, non-English speaking applicants are allowed to utilize both. The use of interpreters is allowed during the initial application process and during the vision examination. Further, the Departmental representatives testified that applicants are allowed to utilize dictionaries – both reference and translation – and are also allowed to retain possession of the dictionaries during the written examination, as opposed to leaving them with the examiner. Not only is the use of dictionaries in violation of official policy as expressed in Captain Howell's January 26, 1996 memorandum, the use of translation dictionaries, as opposed to reference dictionaries, and their retention with the applicant as opposed to the examiner, is in violation of the more lenient standards articulated in the Examiner's Guide.[59]

In July of 1992, even though the Department had already modified its examination policies to conform with its reading of Amendment 509, then Director of the Department Colonel Ned W. McHenry, requested an

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[59] The Defendants admit that the Department allows the use of dictionaries in violation of official policy. In their Post-Trial Brief, the Defendants argued that: "The Department is not inflexible. It allows applicants who do not speak or read English well to use translation dictionaries. . . . " (Defs.' Post-Tr. Br. at 6, ¶ 7.)

opinion from the Attorney General's office on the issue of "whether Amendment No. 509 to the Constitution of the State of Alabama of 1901 prohibits the Department from giving driver license tests in any language other than English." (Pls.' Tr. Ex. 2; *see also* Pls.' Tr. Ex. 3.) The Attorney General issued an Attorney General Opinion in September of 1992 that stated in pertinent part:

> This amendment requires all officials of the state of Alabama to take all steps necessary to insure that the role of English as the common language of the State of Alabama is preserved and enhanced. Thus, to the extent possible, officials of this state should require the use of English in all state actions and programs.
>
> *While requiring an ability to understand English as a requirement to participate in some state programs might be a violation of Title VI of the Civil Rights Act of 1964, or the Equal Protection Clause of the Fourteenth Amendment, consideration of safety and the integrity of the licensing process would support a requirement that driver license examinations be given in English.* Safety considerations would include the person's ability to read and understand highway signs and to understand the directions of law enforcement officers.
>
> It would be practically impossible for the state to accommodate the wide variety of languages of persons applying for a license. To allow such persons to use their own interpreters would, of course, jeopardize the integrity of the test.

CONCLUSION

All persons applying for a driver's license should be required by the Director of the Department of Public Safety to take their licensing tests in English.

(Pls.' Tr. Ex. 5 (emphasis added).) In August of 1992, an "Opinion Review Committee" within the Attorney General's office reviewed and commented on the opinion prior to its issuance. (Pls.' Tr. Ex. 4.) One member of that Review Committee noted that "[w]e use international highway signs [and] shapes therefore safety is not such an issue. I don't think that we can refuse to issue licenses to non [E]nglish speaking people who understand highway signs – An AG's opinion will not protect Major Henry on this issue – some accommodation needs to be made." Another high-ranking reviewer observed that "I am going along with this opinion – but it is dumb."[60] (*Id.*)

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[60] The reason for requesting an Attorney General Opinion months *after* the Department instituted its English Only Policy is not entirely clear, although certain evidence seems to point to the conclusion that the Department was trying to protect its legal interests as opposed to instituting a genuine review of its Policy. As the court noted in its Introduction, above, although the request for an Attorney General's opinion was signed by Director McHenry, it was written by Jack Curtis – then the Department's General Counsel and an Assistant Attorney General. (*See* Pls.' Supp., Ex. 30 at 15 (Curtis Dep.).) Mr. Curtis also drafted the Attorney General's Opinion that responded to the Department's request. (*Id.* at 9, 21.) In other words, he drafted both the Department's request for an opinion and the Attorney General's Opinion itself. Members of the Department gave him input as to how they wanted the Opinion to come out, and "if it were legally possible to do so, [he] drafted it to protect the interests of the department." (*Id.* at 21, 33.)

ii. The Department's accommodation of English speaking applicants

For the purposes of this Memorandum Opinion, and in line with the major categories of applicants articulated above, the court assumes that those applicants who can speak, read, and write English, for purposes of the examination, and are not handicapped, constitute the majority of driver's license applicants in the State of Alabama. These applicants go through the initial application process, vision examination, written examination and performance examination without the need for any special accommodations or deviation from the standard examination procedure. In contrast, illiterate and handicapped English speaking applicants, for example, require accommodations and deviations from the standard examination procedure. Official Department policy is to render substantial aid, and provide substantial assistance above and beyond the standard examination procedure for illiterate and handicapped English speaking applicants, while providing no accommodation for non-English speaking applicants.

What is clear is that given the comment of one member of the Opinion Review Committee that "[a]n AG's opinion will not protect Major Henry on this issue," as well as the comments in the AG Opinion itself that the policy may well be in violation of Title VI and the Equal Protection Clause, high-ranking members of the Alabama Department of Public Safety were concerned with the possible legal ramifications of its English Only Policy, and at least some of the members of the Attorney General's office were aware of the potential legal problems.

For example, the Department's Examiner's Guide provides for oral or audio cassette examinations for illiterate English speaking applicants, and instructs examiners to take time to assure illiterate applicant are at ease, and to assist them with the examination:

ORAL EXAMINATION

Illiterate applicants are entitled to an oral examination, the same as literates are entitled to the written examination. Illiterate applicants must make the same score to qualify; they may miss six (6) questions and still pass the drivers license examination.

1. The examination will be given orally in a courteous manner by the examiner.

2. When interviewing the applicant, the Examiner should speak in an understandable manner and allow the applicant to answer accordingly.

3. Read the questions verbatim with the knowledge examination being taken.

4. Take time to put the applicant at ease, and don't downgrade, or demoralize the applicant because he/she cannot read or write.

5. If the applicant fails the oral examination, take the time to suggest methods for study, and explain the questions the applicant missed.

6. If time permits the applicant should be given the oral examination again, the same as a literate is allowed to re-test.

7. The instructions for scheduling oral examinations should be given to you by your immediate supervisor.

8. Many offices may administer the oral examination by using cassette recorders. Through routine observations, assure the applicant experiences no difficulties with the device.

(*See* Pls.' Tr. Ex. 6 at 38 (Examiner's Guide).) The Department of Public Safety's Driver's License Division's District Commanders for the Huntsville and Mobile, Alabama Districts testified at trial that illiterate applicants either are administered the road rules examination via audio cassette, or an examiner orally reads the written examination to the applicant, utilizing verbiage to help the applicant understand the examination.

The Examiner's Guide also requires examiners to provide special attention and accommodation to handicapped applicants:

DISABILITY EXAMINATIONS

The Rehabilitation Act of 1973 and the Americans With Disabilities Act protect disabled persons (defined as persons with physical or mental impairments that substantially limit major life activities) from discrimination in all *services*, programs, and activities provided by state and local governments.

In order to comply with these acts the following guidelines and procedures will be followed.

Applicants with disabilities will be evaluated on their ability to successfully pass the knowledge and skills examinations. Examiners are to make no assumptions or speculation of an applicant's driving ability based on observation of the applicant's disability.

Examiners will make a thorough evaluation of the applicant's abilities. Examiners will alert the applicant to his limitations and need for special compensating devices.

Reasonable accommodations of the applicant's vehicle such as built-up seat, hand operated accelerator and brake, steering wheel know [sic], etc., will be noted and appropriate restrictions added to the license. Examiners should be careful not to *over* restrict an applicant with disabilities.

> Restrictions are not to keep an applicant with disabilities from driving or create an inconvenience or hardship but to help the applicant be a better and safer driver.

(*See* Pls.' Tr. Ex. 6 at 39 (Examiner's Guide) (emphasis in original).)[61]

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[61] Alabama Code § 32-6-7.1 also requires that the Department accommodate handicapped applicants and prohibits refusal of a license or permit:

> on the grounds of physical appearance, speculations or generalizations that the individual's physical impairment would impede that person's ability to operate a motor vehicle in a safe manner without probable cause to believe the person's ability to operate a motor vehicle in a safe manner is in fact impaired.

Ala.Code § 32-6-7.1 (1975).

Alabama allows hearing impaired or deaf applicants that can read and write English to operate motor vehicle with certain restrictions. (*Id.* at 44.) The State also provides special accommodations for hearing impaired applicants that are illiterate:

HEARING IMPAIRED APPLICANT

If it is determined the deaf applicant is illiterate, you may set an appointment for a sign language examination.

When a hearing impaired applicant needs a sign language examination, the following procedure *shall* be followed.

1. No interpreter from outside the Department of Public Safety will be used with the execption [sic] of the screening process.

2. If possible, complete the application form, obtaining a good mailing address and phone number, determine if the applicant is eligible to be tested.

3. If item two (2) is "yes", advise the applicant it will be necessary for them to report to the District Driver License office to have access to the Hearing Impaired video examination.

4. Notify your District Commander or his designee, giving them all pertinent information necessary to set up the appointment for the applicant. (If possible do this by telephone while the applicant and their interpreter is present).

5. Provide the applicant with directions to the District office. Also, provide the applicant with a written statement advising the date and

> time of the examination, if applicable. Hearing impaired examinations are available to "walk in's" [sic] at the District office. Field offices will assist with scheduling exams if the applicant prefers an appointment.

(*See* Pls.' Tr. Ex. 6 at 44-45 (Examiner's Guide).) The Department of Public Safety's Driver's License Division's District Commanders for the Huntsville and Mobile, Alabama Districts testified at trial that although some hearing impaired applicants are able to take the written examination, the Department utilizes video-taped sign language examinations for those hearing impaired applicants that cannot adequately read or write English. For the performance examination, examiners utilize flash cards picturing what the examiner would like the applicant to do, hand gestures, and written notes to communicate with hearing impaired applicants. (*See, e.g.*, Pls.' Tr. Ex. 9; Hamilton and Byers Testimony).[62]

New residents of Alabama must procure an Alabama driver's license within 30 days after establishing residence in the state. (*See* Pls.' Tr. Ex. 6 at 44 (Examiner's Guide)); *see also* Ala. Code § 32-6-1(a). Alabama allows new residents with a valid license from another state, Canada or Puerto Rico, to simply exchange their out-of-

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[62] In fact, the District Commander for the Huntsville District testified that examiners try to make the performance test for *all* applicants as simple as possible; examiners are taught to be patient, repeat instructions if necessary, and otherwise do everything possible to help the applicant pass.

state license for an Alabama license, under certain conditions, without requiring them to take the written examination or the performance examination.[63] (*See* Pls.' Tr. Ex. 6 at 54-56 (Examiner's Guide).) The applicant must simply present a valid out-of-state license. (*Id.*; *see also* Defs.' Post Tr. Br. at 11 ("The evidence shows that drivers who are licensed in another state are not required to take a written examination to obtain an Alabama driver's license.").)

Alabama also recognizes valid driver's licenses from a plethora of foreign countries under the Geneva Road Traffic Convention of 1949 and the 1943 Convention On The Regulation Of Inter-American Automotive Traffic. (*Id.* at 67.) Alabama Code § 32-6-2(3) exempts from the requirements for procuring a license "[a] nonresident who is at least 16 years of age and who has in his immediate possession a valid driver's license issued in his home state or country." Ala. Code § 32-6-2 (1975). Alabama Code § 32-6-10 empowers the Director of Public Safety to "enter into reciprocal agreements, when not in conflict with law, with other states or countries constituting an exchange of rights or privileges in the use of drivers' licenses within this state by people who hold a valid driver's license in another state or country." Ala. Code § 32-6-10 (1975). According to the Examiner's Guide, the list of exempted foreign countries includes the following:

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[63] These applicants must take the vision examination. (*See* Pls.' Tr. Ex. 6 at 54 (Examiner's Guide).)

Aden
African Locations & Provinces
Albania

Algeria
Andorra
Argentina
Austria
Bahamas
Barrados [sic]
Belgium
Botswana
Brazil
British Honduras
Bulgaria
Cambodia
Cameroons
Canada
Central African Republic
Caylon [sic]
Chile
China
Columbia
Congo (Grazzaville)

Congo (Kinshasa)
Costa Rica
Cuba
Cyprus
Czechoslovakia

Dehomey [sic]

Greece

Grenada
Guatamala [sic]

Guernsey
Guyana
Haiti
Honduras
Hong Kong
Hungary
India
Ireland
Isle of Man
Israel
Italy
Ivory Coast
Jamaica
Japan
Jersey
Jordan
Korea
Laos
Luxembourg
Malagasy Republic
Malawi
Malaya
Mali
Malta
Mauritius

Mexico

Poland

Portugal

Portugese Oversea Prov.

Rhodesia
Romania
Rwanda
St. Lucin [sic]
St. Vincent
San Marino
Senegal
Seychelles
Sierra Leone
Singapore
S.W. Africa
Spain
Surinam
Swaziland
Sweden
Switzerland
Syria
Thailand
Tobacco [sic]

Togo
Trinidad
Tunisia
Turkey
Uganda
Union of S. Africa
United Arab Republic

Denmark

Dominican [sic]
Equador
Egypt

El Salvador

Fiji
Finland
France
French Overseas Territories

Gambia
Germany Federal Republic
Ghana
Gibraltar

Monaco

Morocco
Netherlands
Netherlands Antilles
New Guinea

Nicaragua
Niger
Norway
Panama

Papua
Paraguay
Peru
Philippines

United Kingdom
United States
Uruguay

Urandi [sic]
U.S Territories
Vatican City
Venezuela
Vietnam
Western Samoa
Yugoslavia
Zambia
Zanzibar

See Pls.' Tr. Ex. 6 at 67 (Examiner's Guide).) The Department's Drivers' Manual is even more expansive. (*See* Pls.' Tr. Ex. 32 (Alabama Drivers' Manual).) It provides in pertinent part that:

AN ALABAMA DRIVER LICENSE IS NOT REQUIRED FOR THESE PEOPLE

The following persons may drive a motor vehicle upon the streets or highways in Alabama without an Alabama driver license.

. . .

3. A non-resident at least 16 years old who has in his immediate possession a valid driver license issued to him in his home state or country. This includes military personnel from other states and their families stationed in Alabama, even

though their assignment in Alabama may be of long duration.

4. A non-resident at least 16 years old whose home country does not require licensing of drivers may operate a motor vehicle as a driver for not more than 90 days in any calendar year, if the vehicle operated is duly registered for the current year in the home country of the non-resident.

5. A new resident who has a valid driver license from the state of previous residence may drive without an Alabama license for 30 days after becoming a resident of the state.

6. Any non-resident fulltime student, properly enrolled and registered in a school, college, university, or trade school in this state, who holds a valid license from his home state or country.

(*See* Pls.' Tr. Ex. 19 at 1.)

From a review of the foregoing, it is clear that Alabama provides special accommodations for residents of Alabama that are illiterate, handicapped, hearing impaired or deaf, or who otherwise are unable to take the standard written examination. Alabama also allows individuals with valid licenses from other states, territories and foreign countries to drive in Alabama, without requiring them to obtain an Alabama driver's license and without requiring them to take either the written examination or the performance examination. It cannot be seriously disputed that not every individual who possesses a valid driver's license from one of the other forty-

nine states, territories, or from a foreign country, speaks, reads and writes English. Nevertheless, Alabama will honor their license, and will not require them to take and pass the written examination or the performance examination. A non-English speaker from out-of-state can either drive in Alabama on their valid foreign license, or, upon becoming an Alabama resident, can exchange their valid foreign license for an Alabama license without taking Alabama's written or performance examination. Non-English speaking residents of Alabama, however, cannot get an Alabama driver's license unless they learn the English necessary to pass Alabama's examination process.[64] By providing special accommodations to illiterate applicants, handicapped applicants, out-of-state drivers with valid licenses and even foreign nationals with valid licenses, Alabama singles out resident non-English speaking applicants by requiring them to take their examination in English only, without the aid of interpreters or translation aids.

iii. Impact of the Department's English-Only Policy

The foregoing outlines the regulatory framework which led to this action. In their pleadings and at trial, Plaintiffs produced substantial evidence showing the

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[64] Under Alabama's current licensing rules, a non-English speaking Alabama resident could go to another state or country, obtain a driver's license in that state or country, return to Alabama, and then exchange his or her foreign license for an Alabama license without being required to take either the written or performance examination.

impact of the Department's English-Only Policy on non-English speaking applicants for Alabama driver's licenses that are residents of Alabama.

Brenda Bullock, Director of the Hispanic Ministry of the Catholic Diocese of Birmingham, provided an Affidavit, and Floria Salazar, Director of the Hispanic Ministry of the Catholic Archdiocese of Mobile,[65] both provided an Affidavit and testified at trail [sic] regarding the impact of the Department's English Only Policy on Alabama's non-English speaking population. (*See, e.g.* Pls.' Opp'n, Exs. 9, 10.)

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[65] The Hispanic Ministry of the Catholic Diocese of Birmingham is an outreach group serving Hispanics in approximately thirty-nine counties in northern Alabama. The Hispanic Ministry of the Catholic Archdiocese of Mobile is an outreach group serving Hispanics in the Mobile metropolitan area. Both Ministries are part of a nationwide network that, in part, aids newcomers with limited English skills become acclimated to their new location. The Ministries also coordinate outreach services with other Ministries in the national network and with other local charitable groups.

Ms. Salazar testified that the Mobile Ministry serves approximately 2,500 to 3,000 Spanish speakers from over twenty different foreign countries that reside in several counties in central and southern Alabama. Most of these individuals read and write primarily in Spanish and cannot read or write well in English. Ms. Salazar testified that she had frequent contact with the Birmingham Ministry and that she was familiar with its operations. Ms. Salazar testified that the Birmingham Ministry served a larger client base than the Mobile Ministry.

Both Ms. Bullock and Ms. Salazar stated that they were aware of hundreds of adult residents of the state, who were born in other countries, and are unable to obtain a driver's license because they do not speak or read English fluently. (*Id.*, Ex. 9, Bullock Aff. at 1; Ex. 10, Salazar Aff. at 1; Salazar Trial Test.) Ms. Salazar testified, for example, that through her work with the Mobile Ministry, she personally was aware of approximately three hundred individuals who were legal residents of the state of Alabama, and were unable to take the examinations. She testified that of these three hundred, many drove without licenses. She testified that although they were all anxious to comply with the law, many had to drive to get to work, and could not rely on friends who were not always available, nor on Mobile public transportation because it was, as she described it, "poor."

Ms. Salazar also testified that the named Plaintiff, Martha Sandoval, was typical of many adult legal residents who could not obtain driver's licenses. Many of these individuals arrived in the United States at an older age and learning a foreign language (English) is, in many instances, more difficult for these older individuals than it is, for example, their children. Further, the schooling level of many these individuals is such that they are not well acquainted with the grammar of their native language, which adds to the difficulty of learning a new language. Ms. Salazar testified that of the individuals she had dealt with, it was not that they were opposed to learning English, it was just that they found it very difficult, if not impossible, to do so. One example she gave was of a sixty-five year Cuban male who attempted to get an Alabama driver's license but could not do so. He

drove trucks for the Cuban army for a long period of time, then spent ten years in jail as a political prisoner before coming to the United States in political exile. He has no English language capabilities, and, consequently, could not obtain an Alabama driver's license.[66]

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[66] In this action Plaintiffs proffered the testimony of Doctor Roseann Duenas Gonzalez, a Professor of English at the University of Arizona; Director of the National Center for Interpretation Testing, Research and Policy; and the Director and Principal Investigator for the Federal Court Interpreter and Certification Project. The Federal Court Interpreter Certification Project is responsible for certifying all federal court interpreters pursuant to 28 U.S.C. § 1827, which provides procedures for the use of interpreters in the courts of the United States. The National Center for Interpretation Testing, Research and Policy, where Dr. Gonzalez serves as Director, aids state agencies in developing language policies. In the driver's license context, the Center would determine what the administering agency wanted to test, and then would work with the agency in developing and/or modifying training policies for its personnel, test language, test translation, and test administration policies. In other words, the state agency tells the Center its goals, and the Center helps the agency reach those goals.

At trial, Dr. Gonzalez was qualified as an expert in the fields of sociolinguistics – the study of the relationship between language and society, and as an expert in second language acquisition – the study of how people learn second/foreign languages. For purposes of this action, Dr. Gonzalez reviewed and analyzed the Department's English-Only Policy and the procedures utilized by the Department in issuing driver's licenses.

Dr. Gonzalez testified that it is much more difficult for working adults to acquire proficient English skills than it is for their children, who have many more opportunities to practice English skills. Dr. Gonzalez also testified that employment is the

Both witnesses observed that this inability to obtain a license has limited these individuals' job opportunities, hampered their ability to perform basic tasks such as going to work, the grocery store or the pharmacy, or taking their children to school, and has limited their ability to respond quickly in an emergency.[67] (Bullock Aff. at 2-3; Salazar Aff. at 2.) Ms. Bullock and Ms. Salazar stated that for the vast majority of these individuals, public transportation was not a viable alternative because of Alabama's inadequate or non-existent public transportation system.[68] (*Id.*) In addition, Ms. Bullock and Ms.

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most important causal factor in helping people to learn a new language: "The possession of a driver's license is a requirement for many jobs and certainly expands employment opportunities. Therefore restricting access to the Alabama driver's license exam for limited and non-English speakers will limit work opportunities and significantly retard language shift." (Pls.' Opp'n, Ex. 20, Gonzalez Report at 2.)

Her observations are bolstered by the observations of Colonel Hammond: "Having a driver's license is important to earning a livelihood in this state," (*Id.*, Ex. 1, Hammond Dep. at 18), and the observations of several courts: "Automobile travel is a basic, pervasive, and often necessary mode of transportation." *Delaware v. Prouse*, 440 U.S. 648, 662 (1979); "The right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the nation's history.' " *Wells v. Malloy*, 402 F.Supp. 856, 858 (D.Vt.1975), *aff'd*, 538 F.2d 317 (2d Cir. 1976) ("a driver's license is an important property right in this age of the automobile"). Even the Department recognizes the necessity of access to automobiles. (*See* Pls.' Tr.Ex. 10 at 27.)

[67] Dr. Gonzalez noted the same type of impact. (Pls.' Opp'n, Ex. 20, Gonzalez Report at 1.)

[68] Plaintiffs also presented testimony from Robert J. Jilla, Manager of the Public Transportation Section in the Bureau of

Salazar stated that although many non-English speaking residents who could not get Alabama driver's licenses walk to their destinations or rely on others for transportation, many of these individuals drive without a license out of sheer necessity. Finally, Ms. Salazar testified that not being able to obtain driver's licenses also had an effect on their ability to obtain employment. In many cases, for example, work was not within walking distance, and public transportation did not provide service to the area where they were employed. Or, for example, many of these individuals provide child-care services, and because both parents usually work, the parents require that the care-giver be able to drive in case of an emergency with the child or children.

Also in the record is the Affidavit of Perla Raines, Secretary of the Montgomery Annex of the Catholic Hispanic Ministry in Montgomery, Alabama. She states that she is "aware of approximately 50 individuals who are adult legal residents of the Montgomery area but who are unable to obtain a driver's license because they do not speak or read English fluently." (Pls.' Mot. For Class Cert., Ex. 4, Raines Aff. at 1.) Boyd F. Campbell, an attorney practicing law in Montgomery, Alabama also

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Multimodal Transportation of the Alabama Department of Transportation. At trial, Mr. Jilla detailed Alabama's extremely limited public transportation system, and he reiterated his Affidavit statement that in the limited areas of Alabama that enjoy some sort of public transportation, those systems "[do] not provide service to the majority of residents or employers." (Pls.' Opp'n, Ex. 11, Jilla Aff.) His testimony confirmed evidence presented by the Plaintiffs regarding Alabama's meager or non-existent network of public transportation.

provided an Affidavit in his capacity as chairman of the International Assistance Project of Alabama, Inc., a nonprofit, public service, volunteer organization "that helps non-citizens adapt to life in Alabama, to overcome cultural differences, language, literacy, and legal problems, and to interact successfully with public officials, government agencies and businesses." (*Id.*, Ex. 3, Campbell Aff. at 1.) He stated that he was also aware of "numerous hard-working foreign nationals whose only disability appeared to be a lack of facility with the English language. Of these, few had been able to obtain Alabama driver's licenses." (*Id.*)

Ms. Bullock's, Ms. Salazar's, Ms. Raines' and Mr. Campbell's observations were bolstered by the testimony of the named Plaintiff Martha Sandoval and Lorenzo Leon, two Alabama residents with limited English proficiency. Ms. Sandoval is a permanent resident of the United States who moved to Mobile, Alabama in 1987. She speaks and understands very limited English; Spanish is her primary language. Ms. Sandoval testified that she would like to learn English because it would aid in her everyday life activities such as interacting with non-Spanish speakers at the store or when her children are sick and she needs to communicate with a doctor or nurse. Although she understands limited English phrases such as "thank you," "stop," "come here," "turn right," and "turn left," Ms. Sandoval testified that she could not, for example, read a book in English. To that end, Ms. Sandoval testified that she began taking English classes at a Baptist Church in Mobile, but that she had to stop attending because the classes conflicted with her work schedule. She does not have an Alabama driver's license

although she tried to obtain one in September of 1996. Her attempt failed because she did not speak enough English to meet the examination requirements, and the Department would not let her utilize the services of an interpreter.

Ms. Sandoval cleans homes early in the morning five days per week. She then returns home to clean-up and change before going to work at the restaurant and store that she and her husband own. She works at the restaurant and store from approximately 11:30 A.M. to 9:00 P.M., seven days per week. For the past year or so, Ms. Sandoval has either driven illegally to her jobs, or has waited for friends or her husband to provide her with transportation. Prior to either driving illegally or waiting until relatives or friends could provide transportation, however, Ms. Sandoval would spend hours each day walking to and from work and other locations, whatever the weather. Although her husband has an Alabama driver's license, his work schedule differs from Ms. Sandoval's, (Mr. Sandoval works approximately 4:00 A.M. to 9:00 P.M. daily), no one else in her home has a driver's license, and she has no other relatives in the Mobile area that she could rely on for transportation. Ms. Sandoval started driving illegally because she developed various medical problems and could no longer walk, and also because she had to get her son to school and these [sic] was no bus service. Her son' [sic] school is close to her restaurant.

Ms. Sandoval learned to drive by taking driving classes, and testified that she only drives when necessary. She testified that she has never driven on the interstate or outside of the Mobile, Alabama area. At trial, she demonstrated her knowledge of several Alabama road-signs that

are also used internationally (stop / yield / do not enter), and testified that she has never gotten into an accident, and has never received a ticket. She also stated that she knew that what she was doing was illegal, but that she felt she had no other option. Aside from her current medical condition, several times, for example, emergency situations arose where either she or a family member needed medical attention and she could not call an ambulance because she could not communicate well enough to ask for an ambulance. She had to wait several hours until someone was available to provide transportation. Finally, although she has utilized public transportation in Mobile, the service does not meet her transportation needs.

Lorenzo Leon is a Mexican-born legal alien who moved to the Mobile, Alabama area in 1992. His primary language is Spanish, although he speaks and understands a limited amount of English. Like Ms. Sandoval, English classes conflict with his work schedule, although he does try to utilize his limited English skills on a daily basis. Mr. Leon owns four restaurants: two in Mobile, Alabama, one in Fairhope, Alabama, and one in Ohio. He visits the Mobile restaurants daily, the Fairhope restaurant once or twice a week and the Ohio restaurant rarely. Besides supervising employees, he does any maintenance work that is needed and cooks occasionally. He works seven days per week, sometimes fourteen hours per day.

Mr. Leon does not have an Alabama driver's license, although he testified that he tried to get an Alabama driver's license on approximately five different occasions but failed each time. He was able to go through the initial application process with the aid of an interpreter and was able to pass the vision examination without the aid of an

interpreter. However, on each occasion, he failed the written examination because he did not understand enough English. He never took the skills examination (road test).

Like Ms. Sandoval, Mr. Leon drives without a license. And, like Ms. Sandoval, he testified that he knew that what he was doing was illegal, but that he drove out of necessity. No one else in his house has a valid license, and he testified that he needs to take his children to school, go to work, and participate in other life activities where the ability to use an automobile was necessary. He testified that he could not rely on friends and relatives because they were not always available. Nor could he rely on public transportation because it did not meet his transportation needs. Finally, Mr. Leon testified that he very much wanted a driver's license both for his and his family's sake, and so that he could obtain insurance for his vehicles.

The testimony of Ms. Salazar, Ms. Bullock, Ms. Gonzalez, Ms. Sandoval and Mr. Leon was quantified by Doctor Donald Bogie, a Professor of Sociology at Auburn University at Montgomery; the Director of the Center for Demographics and Cultural Research also located at Auburn University at Montgomery; and the President-Elect of the Alabama-Mississippi Sociological Association.[69] At trial, Dr. Bogie was established as an expert in the analysis of demographic data. (*See also*, Pls.' Tr. Ex. 16 (Dr. Bogie's Curriculum Vitae).) Demography, as explained by Dr. Bogie, is the study of, among other

[69] Doctor Bogie has over thirty years of experience in the analysis and interpretation of census and population related data. (Pls.' Opp'n, Ex. 19, Bogie Aff. at 1, ¶ 1.)

things, population distribution and characteristics. Demographers study, for example, the race, age, sex, occupation, educational level, and economic status of certain populations, and draw various socioeconomic and factual conclusions. For example, a demographer could determine migratory trends among discrete population groups or determine which geographical areas show gains or losses in population. A demographer could also determine specific characteristics of discrete populations. For purposes of this trial, Dr. Bogie's testimony was focused on Alabama's non-English speaking population.

Dr. Bogie's Affidavit and trial testimony were based, in part, on data collected by the United States Department of Commerce, Bureau of the Census, in 1980 and 1990.[70] This census data became a point of controversy between the Parties because of Dr. Bogie's contention that the census data inaccurately reflects minority populations in the state of Alabama. The Defendants argued several times that the 1980 and 1990 census data was complete in and of itself and should not be qualified in any way by any evidence of an "undercount." Defendants argue that Plaintiffs' attempt to "impeach or modify the Census Results . . . is legally irrelevant" because of the Supreme Court's decision in *Wisconsin v. City of New York*, 517 U.S.

[70] The federal Constitution requires an "actual Enumeration" of the population of the United States every ten years. U.S. Const., Art. I, § 2, cl. 3. Congress is empowered to conduct the census "in such Manner as they shall by Law direct." *Id.* Through the Census Act, 13 U.S.C. § 1 et seq., Congress has delegated this responsibility to the Department of Commerce, and, more specifically, the Bureau of the Census. 13 U.S.C. §§ 2, 21.

1 (1996). (Defs.' Obj. To Pls.' Tr. Ex. at 1, ¶ 2.) There, the Supreme Court held that the Secretary of Commerce was not constitutionally obligated to adjust census data. *Id.* at 23.

That holding, however, was based on the discretion bestowed by Congress upon the Secretary through the Census Act, and not on any constitutional or statutory mandate that official census data be regarded as definitive. *Id.* at 23-24. In rejecting the argument that the Court should review de novo, the Secretary's determination not to adjust census data, the Supreme Court stated:

> Respondents' argument fundamentally misapprehends the basis for our deference to the Secretary's determination that the adjusted census results do not provide a more distributively accurate count of the population. Our deference arises not from the highly technical nature of his decision, but rather from the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary. Regardless of the Secretary's statistical expertise, it is he to whom Congress has delegated its constitutional authority over the census. For that same reason, the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision.
>
> . . .
>
> [T]he Secretary's conclusion . . . was . . . a reasonable choice in an area where technical experts disagree . . . we conclude that his decision not to adjust the 1990 census was "consonant with, . . . the text and history of the

> Constitution. . . . " *Franklin*, 505 U.S., [sic] at 806.[71]

Id. at 24.

The Plaintiffs argued at trial that *Wisconsin* is not amenable to the interpretation given by the Defendants, and that actually, it aids their position because in *Wisconsin*, the Supreme Court noted that historically, each census suffered from an "undercount." The Plaintiffs also argued that Dr. Bogie is an expert giving his opinion and interpretation of the census data and that evidence of an undercount is, consequently, admissible. The court agreed with Plaintiffs at trail [sic], and readopts its previous ruling here.[72]

Defendants' reliance on *Wisconsin* is misplaced; nothing in that opinion precludes Plaintiffs from offering testimony or evidence, be it expert or otherwise, that calls into question the reliability of census data, or, consequently, a court finding that particular census data is

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[71] *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

[72] Further, the court is somewhat mystified at Defendants insistence that the official census numbers, and those numbers only, apply in this action. This court would be just as willing, and just as obligated, to exercise its constitutional and statutory powers to remedy a proven disparate impact on non-English speaking resident of Alabama based on Defendants' proffered census numbers. Consequently, whether the court relies on the exact numbers stated in the 1980 and 1990 census, as Defendants would have the court do, or whether the court believes the numbers to be subject to modification due to various factors, including an undercount, is really of no import. All that is required is that Plaintiffs show a disparate impact – the exact number of those effected is not dispositive.

indeed incomplete. *Wisconsin* merely holds that the Secretary of Commerce was not constitutionally obligated to alter data. Accordingly, the court views Dr. Bogie's Affidavit and trial testimony as the testimony of a qualified expert under Federal Rules of Evidence 702, 703 and 705, and will weigh Dr. Bogie's testimony along with all other evidence presented, including the proffered census data, in making its findings of fact.[73]

Dr. Bogie's Affidavit and trial testimony addressed three main issues: (1) the census undercount; (2) the number of non-English speaking residents of Alabama

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[73] Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 703 reads:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Finally, Federal Rule of Evidence 705 provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

and the growth rate of this population; and (3) the primary languages spoken at home by these non-English speaking residents. Regarding the census undercount and the number of non-English speaking residents of Alabama, Dr. Bogie stated:

CAUTIONARY NOTES IN
INTERPRETING CENSUS DATA

> 8. It is widely accepted that the census undercounts certain segments of the population. Members of minority groups and individuals with limited education, for example, are often undercounted due to their relatively low response to the census questionnaire.[74]
>
> 9. The 1990 census data regarding Hispanic residents likely represent an undercount of the actual numbers. In 1980, the census count for Hispanic residents of Alabama was 33,299. In 1990, the reported count declined to 24,629. Virtually all of this decline occurred in the Mexican component of the Hispanic population. It is theorized that the decline resulted from concerns on the part of many newly-arrived Mexican immigrants that the census data might be used in a way that would adversely affect their continued residence in the United States. The low educational levels that characterize many members of this group may also contribute to the group's apparently low response to the

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[74] In *Wisconsin*, the Supreme Court acknowledged the perpetual existence of an "undercount" and noted that "[s]ince at least 1940, the Census Bureau has thought that the undercount affects some racial and ethnic minority groups to a greater extent than it does whites." 517 U.S. at 6-8.

> census questionnaire. Independent observers who work directly with various segments of the Hispanic population in Alabama contend that the number of Hispanics is actually much larger than the total reported in the 1990 census and significantly greater than a later estimate of 30,913 that was prepared in 1994 by the Bureau of Census.[75]

(Pls.' Opp'n, Ex. 19, Bogie Aff. at 3-4; *see also* Pls.' Mot. For Class Cert., Ex. 1, Bogie Aff., ¶ 3.)

In support of his opinion, Dr. Bogie testified at trial that in 1996, the Bureau of the Census estimated that there were 35,857 Hispanic residents of Alabama. (*See* Bogie Tr. Test.; Pls.' Ex. 18, (citing Bureau of the Census, *Estimates of the Population of Counties By Age, Sex, Race and Hispanic [sic] origin: 1990 to 1996* (December 18, 1997 release).) He also testified that it was difficult for him to believe that there was a twenty-five percent drop in the number of Alabama's Hispanic residents between 1980 (33,299) and 1990 (24,629) because it was not in line with the "roller-coaster" of numbers that he has observed in his thirty years of analyzing census data. He testified that he believed that the number may be as high as two times the 1990 (24,629) and 1996 (35,857) figures. He also based his opinion, in part, on the following factors: (1) the census has documented that there is an undercount in the Hispanic population; (2) there is a high degree of

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[75] All of Dr. Bogie's statistics came from the 1980 and 1990 census as well as other reports from the Bureau of the Census. (Pls.' Opp'n, Ex. 19, Bogie Aff. at 1, ¶ 3.)

mobility in the Hispanic population and not all individuals may be counted; (3) there may be language problems on the census forms and those with limited English skills are more likely not to report; (4) as expressed in his Affidavit, there is a disproportionate fear of supplying information; and (6) some Hispanic residents, as is true for all residents, are just missed, or don't respond.

Without taking into account this undercount, however, Dr. Bogie quantified census data regarding non-English speaking Alabama residents. Dr. Bogie testified that according to data from the 1990 census, of those Alabama residents sixteen and older that were not foreign-born, 2.1 percent spoke a language other than English at home. (*See also* Pls.' Tr. Ex. 17.) Of those Alabama residents sixteen and older that were foreign-born, 49.5 percent spoke a language other than English at home. (*See also Id.*). Dr. Bogie also testified that because of the heightened problems associated with counting non-English speakers outlined above, he believed that the 49.5 percent statistic may be low.

Dr. Bogie then translated these percentages into concrete figures based on data from the 1980 and 1990 census regarding Alabama residents over the age of eighteen:

ABILITY TO SPEAK ENGLISH

> 4. In 1980 and 1990, the Bureau of Census collected information concerning "ability to speak English" by asking the following three-part question:
>
> (a) "Does this person (referring either to the respondent or other persons in the

household for whom the respondent is supplying information) speak a language other than English at home (yes, no)?";

(b) "What is this language?"; and

(c) "How well does this person speak English (very well, well, not well, or not at all)?"

5. The census findings indicate that from 1980 to 1990, the number of Alabama residents aged 18 years or older who "did not speak English well" or "did not speak English at all" more than doubled. In the 1980 census, 4,287 persons aged 18 years or older indicate that they "did not speak English well" or "did not speak English at all." In the 1990 census, the number was 10,158 – an increase of 136.9 percent. If the same rate of increase is maintained throughout the 1990s, there will be a projected 24,069 adult Alabama residents in the year 2000 who will not be proficient in English.

6. In the 1990 censes [sic], Hispanics comprised the largest number of adults (4,205) who "did not speak English well" or "did not speak English at all." Asians and Pacific Islanders comprised the next largest defined group (2,302).[76]

(Pls.' Opp'n, Ex. 19, Bogie Aff. at 1-2.)

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[76] There were also 3,650 adults who indicated that they spoke "other languages," but "did not speak English well" or "did not speak English at all." Neither the identity of these "other languages" nor the nationalities of the respondents was specified in the published data. A similar report on individuals aged 5 years or older indicated that Hispanics (5,965), Indo-Europeans (4,436), and Asians or Pacific Islanders (2,769) were most likely to "not speak English well" or "not speak English at all." [Footnote number 2 in original].

Also relying solely on census data, Dr. Bogie addressed the growth rate of these population groups:

PROJECTED NUMBER OF HISPANICS AND ASIANS AND PACIFIC ISLANDERS

7. As indicated above, adults who spoke a foreign language at home and "did not speak English well" or "did not speak English at all" were most likely to speak Spanish or an Asian or Pacific language. These two groups represent the fastest growing racial or ethnic groups in Alabama.[77] The Bureau of Census projects that the number of Hispanics aged 15 or older will increase by 10,227 during the 1990s – a gain of 61.3 percent. During the years 2000 to 2010, the Hispanic population in the state is expected to increase by 32.4 percent (i.e. by 8,715 individuals). Likewise, the population of Asians and Pacific Islanders is expected to increase by 55.8 percent (i.e. by 9,238 persons) during the 1990s, and by 32.2 percent (i.e. 8,300 persons) during the years 2000 to 2010.

(Pls.' Opp'n, Ex. 19, Bogie Aff. at 2-3.) In all, Dr. Bogie estimates that according to 1990 census data, over 13,000 adult residents of Alabama would have difficulty in obtaining an Alabama driver's license because of the Department's English-Only Policy. (*See* Pls.' Mot. For Class Cert., Ex. 1, Bogie Aff., ¶ 2.)

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[77] For purposes of the census, individuals were asked to identify themselves as members of one of the following racial/ethnic groups: (1) White, (2) Black, (3) American Indian, Eskimo, or Aleut, (4) Hispanic and (5) Asian or Pacific Islander. [Footnote number 3 in original].

Based on the foregoing, it is clear that the Department's English-Only Policy disproportionately impacts resident non-English speaking foreign nationals. Plaintiffs have established "a causal link between the defendant's challenged practice and the disparate impact identified;" the evidence does not show that "even had the defendants not engaged in the challenged practice, the same disparate impact would nonetheless have existed." *Elston*, 997 F.2d at 1407. Of the non-English speakers in the State of Alabama, the majority are from foreign countries. Although only approximately one percent of Alabama residents are Hispanics or Asian/Pacific Islanders, almost two-third of Alabama residents who do not speak English fluently are of such a background. The testimony of Dr. Bogie, among others, established the state-wide nature of the disparate impact, and the testimony of Ms. Salazar, Ms. Bullock, Ms. Sandoval, Mr. Leon, and Mr. Campbell, established the individualized nature of the impact on non-English speaking residents of Alabama. Finally, it is clear that by providing special accommodations to illiterate and handicapped resident applicants, as well as out-of-state and foreign drivers with valid licenses, Alabama singles out resident non-English speakers through its English-Only Policy. The court finds that the Department's English-Only Policy works an unjustified disparate impact on the basis of national origin in violation of Title VI.

3. The Defendants have not proven that there exists a "substantial legitimate justification" for the English-Only Policy in order to avoid liability. Alternatively, if the Defendants have met this burden, the Plaintiffs have offered comparably effective alternative practices which result in less disproportionality

As a threshold matter, the court notes that prior to this lawsuit, the sole justification offered for the Department's English-Only Policy was Amendment 509. Colonel McHenry's request for an Attorney General's Opinion asked only if Amendment 509 required the English-Only Policy. (Pls.' Opp'n, Ex. 6.) The Department's amendment to its Examiner's Guide cited only Amendment 509 as the source of the English-Only Policy, as did Captain Howell's Memorandum to All District Commanders. (*Id.*, Exs. 3, 4.) Major Cottingham, Chief of the Driver's License Division at the time the English-Only Policy went into effect testified that Amendment 509 was the only reason for the policy change. (Pls.' Opp'n, Ex. 2 at 27.) Lieutenant Hamilton, District Commander for the Mobile District Office and Lieutenant Byers, District Commander for the Huntsville District Office, testified at trial that the Amendment was the sole reason for the policy change.

The Attorney General's Opinion notes that the sole question presented was whether Amendment 509 "prohibit[s] the [Department] from giving driver license tests in any language other than English?" (Pls.' Tr. Ex. 5 at 1.) After opining that Amendment 509 required the Policy, and noting that the Policy probably violated Title VI and the Equal Protection Clause, the Attorney General then

cited highway safety, administrative accommodation, and test integrity concerns as justifying the policy. (*Id.* at 2.)

In their pleadings leading up to trial, however, Defendants offered more justifications for the Policy. In addition to the proffered justifications that the Policy: (1) is required by Amendment 509; (2) is justified by highway safety concerns; (3) is justified by administrative accommodation problems; and (4) is justified by examination integrity concerns, the Defendants argue that the English-Only Policy: (5) reflects the national policy that English is the official language of the United States; and (6) is justified by funding concerns.

In their Post-Trial Brief, however, Defendants seem to have abandoned all of their justification arguments but two. They argue that "Defendants' practice of testing in English vindicates two important principles: the English language as an organizing principle, and Alabama's interest in the safety of its roads." (Defs.' Post-Tr. Br. at 12.)

Despite Defendants' scatter-shot assertions, in an abundance of caution and with due respect for the concerns of the Department, the court will address all asserted justifications. An examination of those justifications discloses, however, that the Defendants have failed to meet the threshold of proving that there exists a "substantial legitimate justification" for the English-Only Policy in order to avoid liability, *Elston*, 997 F.2d at 1407 (citing *Georgia State Conference*, 775 F.2d at 1417).

a. The English-Only Policy is not required by Amendment 509

With all due respect to the Attorney General's determination that Amendment 509 and highway safety, administrative accommodation, and test integrity concerns justify the English-Only Policy, the Supremacy Clause of the United States Constitution states that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI. Cl. 2.

The Supremacy Clause deprives the States of the power to pass laws that conflict with federal statutes. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998). To the extent the Department's English-Only Policy could be read as a requirement of Alabama's Amendment 509, the requirements of Title VI would trump that policy via the Supremacy Clause.[78]

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[78] Other states with official English laws still provide state services in foreign languages. In Arizona, for example, the Attorney General issued an opinion regarding that State's Official English law. In discussing the opinion, the United States Supreme Court noted that:

> In Opinion No. I89-009, the Attorney General said it was his obligation to read Article XXVIII "as a whole," in line "with the other portions of the Arizona Constitution" and "with the United States Constitution and federal laws." App. 61. While Article XXVIII requires the performance of "official

b. The Defendants have offered no proof that resident non-English speakers are a greater safety risk on Alabama highways than English speakers

Although the Defendants consistently argue that the English-Only Policy is justified by safety concerns, (Defs.'

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acts of government" in English, it was the Attorney General's view that government employees remained free to use other languages "to facilitate the delivery of governmental services." *Id.*, at 62. Construction of the word "act," as used in Article XXVIII, to mean more than an "official ac[t] of government," the Attorney General asserted, "would raise serious questions" of compatibility with federal and state equal protection guarantees and federal civil rights legislation. *Id.*, at 65-66.

Arizonans for Official English v. Arizona, 117 S.Ct. 1055, 1061.

The Court went on to note that:

> Specifically addressing "[t]he handling of customer inquiries or complaints involving state or local government services," the Attorney General elaborated:
>
> "All official documents that are governmental acts must be in English, but translation services and accommodating communications are permissible, and may be required if reasonably necessary to the fair and effective delivery of services, or required by specific federal regulation. Communications between elected and other governmental employees with the public at large may be in a language other than English on the same principles." App. 74.

Id. 1061, n. 7.

Mem. at 11; Defs.' Reply at 10; Defs.' Post-Tr. Br. at 12), they have produced no evidence that resident non-

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California's Attorney General issued an opinion on that State's almost identical Official English law noting that:

> translations as an aid to understanding the official English text or a purely informational or educational use of a foreign language by a public agency in a nonofficial context (i.e., a use not intended to have intrinsic legal significance) would not be constitutionally prohibited under section 6(b).

(Pls.' Opp'n, Ex. 16 at 12.)

The Alaska Attorney General, when queried whether Alaska's Department of Public Safety could prohibit the use of interpreters and disallow oral testing for persons who do not read English, concluded that:

> [U]nless you provide a satisfactory alternative for persons who do not read English to demonstrate their qualifications for a driver's license, you may not prohibit the use of interpreters or disallow oral testing. Our answer is founded on the universally accepted proposition that the privilege to drive an automobile is too important to an individual to permit its denial as a whole to a linguistic minority.
>
> It is not only possible but, on the whole, probable that a person who can drive can also recognize traffic signs and signals in the English language even if otherwise unable to read English. Therefore, to deny these people an opportunity to take the driver's license test would deny them the equal protection of the laws.

(Pls.' Supp., Ex. 32 (1978 Alas. Op. Att'y. Gen. J-66-623-78 (1978).))

Similarly, Utah's Department of Public Safety requested an opinion from that State's Attorney General regarding whether a State statute required individuals with limited English language

English speakers constitute a greater risk on Alabama's roads, either quantitatively or proportionally, than

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skills to meet the same minimum licensing examination required of people who have no such limitation. Utah's Attorney General noted that although non-English speakers had to meet similar standards of road safety, an "individuals inability to read and speak English must be related to his competence as a driver." (Pls.' Supp., Ex. 35, (1980 Utah Op. Att'y Gen. 80-80 (1980).)) The Utah Attorney General went on to note that the State could deny a license to an individual "[w]here inability to read English would jeopardize an individual's ability to safely operate an automobile on the public highways," but warned that:

> this competence . . . may not be related in any way to the individual's ability to speak English or successfully take a written examination in the English language, without the aid of a translator. Neither of these abilities is specifically required by statute, and if either were it might raise a question of whether or not it violated equal protection since it may not be related to the purpose of promoting competent and safe driving.
>
> While an immigrant or alien may not speak English, it is possible that he was a very competent driver in his own country, and it is also possible for such an individual to learn all of the various warning signs and direction signs (through a combination of shape and color identification with memorization of commonly-used words) even though he may not easily read or speak English.
>
> In many areas, the so-called "international" symbols have been included on most public highway signs, to facilitate driving for the non-English-speaking person. Many countries also honor an international driver's license, recognizing that the nonnative-language speakers are still safe drivers.

(*Id.*)

English speakers. Indeed, Colonel Hammond, Assistant Director of the Department from 1987 to 1991 and Chief of its Driver's License Division from 1978 to 1987, testified both in his deposition and at trial, that during his tenure at the Department, he was not aware of any evidence showing that non-English speaking drivers were more likely to get into accidents than English speaking drivers or that accidents involving non-English speaking drivers were more severe than accidents involving English speaking drivers. (Pls.' Opp'n, Ex. 1, Hammond Dep. at 13-14.) Nor were there any instances where an accident occurred while a Department examiner was administering the road skills portion of the examination to a non-English speaking applicant. (*Id.* at 16.)

Georgia's Attorney General concluded that Georgia's Official English law did not "either mandate the exclusive use of the English language or prohibit the use of other languages." (Pls.' Supp., Ex. 33 (1995 Ga. Op. Att'y Gen 95-44 (1995).)) Georgia's Attorney General noted that Georgia's Department of Public Safety currently administered its driver's license examination in fourteen different languages and was considering expanding its foreign language program. Because the State statute was silent, the Attorney General concluded that whether to continue the program "is a decision of policy to be made by the Department." (*Id.*)

Although Defendants object to the opinions of Attorneys General from other states, arguing those opinions to be "irrelevant," (Defs.' Resp. at 3), the court notes those opinions as indicative of the competing state and federal interests inherent in such Official English laws, and indicative of the disagreement – apparently between Alabama, and perhaps Georgia on the one hand, and Utah, Alaska, California, and Arizona on the other – over the scope and applicability of such laws.

Major Cottingham, Chief of the Driver's License Division from 1989 until 1994, bolstered Colonel Hammond's testimony. Major Cottingham testified that he was aware of no evidence showing: (1) that non-English speakers are more likely to get into accidents than people who do not speak English; (2) that non-English speakers have difficulty comprehending traffic signals; or (3) that non-English speakers were involved in accidents during the road skills portion of the examination. In fact, Major Cottingham was unaware of *any* problems with non-English speaking persons driving in Alabama. (Pls.' Opp'n, Ex. 2, Cottingham Dep. at 40-41.) Finally, Colonel McHenry, former Director of the Department of Public Safety, testified that he was unaware of any safety problems associated with issuing driver's licenses to persons who were not fluent in English. (Pls.' Opp'n, Ex. 7, McHenry Dep. at 19-20.)

Given the lack of evidence proffered by the Defendants in support of their safety justification, and the testimony of Colonel Hammond, Colonel McHenry and Major Cottingham, the court finds that the Defendants have failed to meet their evidentiary burden. A bare conclusory assertion is certainly not a "substantial legitimate justification" as contemplated by *Elston*, 997 F.2d at 1407 (citing *Georgia State Conference*, 775 F.2d at 1417).

In addition, a close examination of Defendants' safety rationale discloses internal inconsistencies. The Defendants' contend that:

> The Department's belief that, as the Attorney General's Opinion states, "[c]onsideration of safety . . . would support a requirement that driver license examinations be given in English. Safety considerations include the person's ability to read and understand highway signs and to understand the directions of law enforcement officers," *see* Exhibit H, is not irrational. The belief dovetails with 49 C.F.R. § 391.11(b)(2)'s focus on the understanding of traffic signs and signals and responding to official inquiries.

(Defs.' Reply at 10.) The court notes that the *only* safety rationales offered by the Defendants, anywhere in their pleadings, are the one's [sic] proffered by the Attorney General; the ability to read traffic signs and the ability to communicate with law enforcement officers. In specific support of the communication aspect of their safety argument, they cite only to 49 C.F.R. § 391.11(b)(2) – federal regulations requiring operators of commercial vehicles to demonstrate limited English proficiency. As noted below, that regulation is not only easily distinguishable from the instant action, but it has been challenged as violative of Title VI and is currently under review by the federal Department of Transportation.

Defendants fail to address why their same safety concerns are not raised when it comes to Alabama's illiterate and deaf population. No matter what language they speak, illiterates, by definition, cannot read. Therefore, illiterate English speakers, like *some* non-English speakers, cannot read road signs. In fact, given the demographic statistics noted above, a higher percentage of Alabama's driving-age population are illiterate than are non-English speaking. (*See* Defs.' Post-Tr. Br. at 5 ("As Plaintiffs have shown, there are far more functionally illiterate Alabamians than there are speakers of foreign languages who do not speak English well or at all.").)

Nevertheless, the Department apparently sees no safety concerns with the higher percentage of illiterate drivers that ostensibly cannot read road signs.

Further, after reviewing the Department's licensing procedures, Dr. Gonzalez noted that:

> [The Department regards driving as] a skill that does not rely on reading, but that relies on the comprehension of symbols and the physical execution of driving according to highway safety rules. The *Alabama Driver's Manual* itself states that more symbols and pictures are being used for road signs, which advantageously allows for quicker recognition. This is especially significant in that many non-English speaking individuals have learned to drive in their own countries and can easily adapt to driving rules that are obvious and reinforced through visual signs.
>
> The overwhelming majority of signs tested in the written exam are universally understood international symbols. Out of twenty-eight different signs included in the six English test versions, an examinee would only have to recognize one abbreviation ("RR") and two words ("soft shoulder"). Dependence on these symbols for driving is the reason that any one of us can drive when we travel in Mexico, on the Autobahn in Germany, or on the Appian Way in Italy. For the non-English speaker in the United States, the role of language in this visual recognition task is significantly diminished.

(Pls.' Opp'n, Ex. 7, Gonzalez Report at 7.)

The ability to read road signs, however, may be a nonissue because of Alabama's utilization of international highway symbols that are understood without the

need for proficiency in a specific language. Martha Sandoval and Lorenzo Leon demonstrated at trial how those with limited English skills could still understand road signs utilized in Alabama and around the world. Their testimony was bolstered by Dr. Gonzalez, who explained how the reading and comprehension of traffic signs is not impaired by the inability to speak a particular language. (*See* Pls.' Tr. Ex. 15, Gonzalez Report at 6-7.) As one reviewer of the Attorney General's Opinion regarding the Department's English-Only Policy noted: "We use international highway signs and shapes therefore safety is not such an issue." (Pls.' Tr., Ex. 4, Opinion Review Committee Memorandum.) Indeed, Martha Sandoval was able to successfully complete driver's education training, even with her lack of English proficiency.

Another inconsistency in Defendants' safety rationale is that deaf drivers, like some non-English speakers, cannot communicate orally, in English, with law enforcement officials. It is safe to assume that many, if not most law enforcement officials in the State of Alabama do not speak, read, write, or understand a foreign language, and are probably not conversant in Sign Language. Further, the Defendants have produced no evidence establishing that non-English speakers do not understand the directions of law enforcement officers. It is undoubtedly true that some non-English speakers, like some deaf driver's [sic], would not understand the oral, English language directions of law enforcement officials. Nevertheless, Lieutenants Byers and Hamilton testified that while performing law enforcement duties on Alabama roads and while administering the road skills examination, alternate methods of communication are utilized with those who

cannot communicate orally, in English. (*See* Byers Test.) For example, Lieutenants Byers and Hamilton testified that while serving as troopers, they utilized hand signals and other non-English communication skills to communicate with these individuals. Lieutenants Byers and Hamilton also testified that they experienced no problems when relying on flash cards, hand signals, and pointing, rather than oral communication in English, to administer the road skills examination. In fact, as noted above, the Department has endeavored to make the road skills examination as simple as possible; examiners are told to be patient, repeat instructions if necessary, and do everything possible to help the applicant pass. Their testimony was bolstered by the testimony of Dr. Gonzalez:

> It is not necessary to comprehend and speak English in order to understand public safety officials' instructions because such officials communicate largely with gestures. Officials are generally trained to communicate with gestures whenever necessary for public safety. A public safety official would have to use gestures to get a deaf driver to present his or her license, or to navigate around an accident or construction zone. The same kind of accommodation is commonly made with non-English speakers.

(Pls.' Tr. Ex. 15, Gonzalez Report at 7.)

Finally, as previously noted, Alabama allows non-English speakers from other states and other countries to drive in Alabama as long as they have a valid license. Alabama also issues Alabama licenses to new resident non-English speakers who have valid licenses from other states or countries. Defendants' safety arguments do not address these exceptions or explain how non-resident

non-English speakers are somehow less of a safety risk than resident non-English speakers.

It is clear that Alabama provides a multitude of special accommodations for illiterate applicants (audio-taped examinations; examiners orally reading the written examination); deaf applicants (video-taped Sign Language examinations; flash cards depicting driving maneuvers); and non-resident non-English speakers. Nevertheless, no equivalent accommodations are made for resident non-English speaking applicants.

The Defendants' safety argument is not a "substantial legitimate justification" for its English-Only Policy. *Elston*, 997 F.2d at 1407 (citing *Georgia State Conference*, 775 F.2d at 1417). The Defendants have not shown concrete or abstract factors justifying its policy as "legitimate, important, and integral to the defendant's institutional mission," *Id.* at 1413, nor have the Defendants shown that the justification bears a "manifest demonstrable relationship" to the challenged policy. *Id.* at 1412 (citing *Georgia State Conference*, 775 F.2d at 1418). Safety itself, of course, is "legitimate, important, and integral" to the Department's institutional mission. Nevertheless, safety concerns are addressed by examining applicant proficiency in the substantive aspects of the vision, written, and road skills examinations, not in the ability to read the written examination or communicate in English with the examiner. (*See* Defs.' Post Tr. Br. at 6 ("The Department's practice of testing applicants on their knowledge of the rules of the road in the written examination is inherently safety-related. . . . applicants for driver's licenses are tested to make certain that they are capable of driving safely on the roads of Alabama"); Pls.' Opp'n, Ex. 20, Gonzalez

Report at 7 ("It is understood by the Department of Public Safety that driving is a skill that does not rely on reading, but that relies on the comprehension of symbols and the physical execution of driving according to highway safety rules").) Alabama's past and present licensing of illiterate residents, deaf residents, and nonresident non-English speakers proves the point.

c. The Defendants' arguments regarding the administration and application of foreign language examinations are unpersuasive

The two arguments proffered by the Defendants in support of their administrative justification for the English-Only Policy relate to the administrative burden placed on the Department and the integrity of the examination process. The court finds neither of these arguments persuasive.

As a threshold matter, the court notes that the Department administered written examinations in approximately fourteen foreign languages for over a decade. Colonel Hammond testified at trial that during all of this time period, the Department did not experience any significant or disproportionate problems in giving the examination in a foreign language. As noted earlier, he viewed the program as beneficial and productive, and took steps to expand the program when demand was great enough. The only complaints related to the longer-than-average time period it took to administer foreign language examinations. This argument, however, is equally applicable to the administration of examinations

to illiterate English-speakers and deaf applicants. It cannot be reasonably contested that having an examiner read the written examination to an illiterate English-speaking applicant takes as long, if not longer, than providing a non-English speaking applicant with a written examination in a foreign language or an examiner retaining a translation dictionary during the examination.

i. Examination administration

Defendants argue that "[t]he Department lacks the administrative resources necessary to read foreign-language examinations to applicants like the plaintiffs." (Defs.' Reply at 11; *see also* Defs.' Post Tr. Br. at 5.) Currently, some illiterate English-speaking applicants are read the written examination by Department employees. Prior to the cessation of foreign language examinations, however, these examinations were not read to non-English speakers applicants; written translations were used. Further, although some illiterate applicants are read the examination, some are administered audio-taped recordings. And, the Department has offered no proof that deaf applicants are provided with Department-employed live interpreters proficient in Sign Language; the examination is administered to them in sign Language via video-tape. Accordingly, consistent with its prior practice, the Department could offer foreign language examinations in translated written form. And, consistent with its current practices, the Department could offer audio-taped or even video-taped foreign language examinations. Like Arizona or California, the Department

could provide audio-taped examinations or allow applicants to bring interpreters with them to the examination. The Department would not have to employ interpreters to read the examination to non-English speaking applicants. Defendants' argument that the Department does not have the administrative resources to read foreign language examinations to non-English speaking applicants, even if true, fails to address the obvious, already validated alternatives. Consequently, the argument has little merit.

As for Defendants' arguments regarding the extra time expended on foreign language examinations, the Department spends as much time, if not more on illiterate English speaking applicants, and has to take extra-time with deaf and handicapped applicants as well.

Next, Defendants argue that there is no principled way to decide what foreign languages should be accommodated, nor what language dialects should be offered. They argue that by offering a finite number of translated examinations, other languages are necessarily excluded. (Defs.' Mem. at 8-10; Defs.' Reply at 3, 9, 11.) Plaintiffs respond that:

> This alleged concerns [sic] about "the limits of accommodation" is greatly exaggerated. The range of foreign languages spoken in Alabama is quite limited. *See* [Pls.' Opp'n, Ex. 19, Bogie Aff.]. Ninety-five percent of the requests for language assistance received by the Linguistic Databank in Montgomery, Alabama last year were requests from persons who spoke Spanish, Lao, Cambodian, Japanese, Vietnamese, Korean, Thai, or Chinese (Mandarin and Cantonese).

> [*Id.*, Ex. 23, Ware Aff.].[79] Not surprisingly, the eight languages most frequently requested by

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[79] Dr. Lewis B. Ware is a Professor of Middle Eastern Studies at the Air University, Maxwell Air Force Base, and is the Director of the Linguistic Databank for the International Assistance Project of Alabama. He provided affidavits for both Parties in this action. (*See* Pls.' Opp'n, Ex. 23; Defs.' Mem., Ex. B.) The Databank "is a volunteer service that provides translators and interpreters to foreign language speakers in emergencies." (Pls.' Opp'n, Ex. 23, Ware Aff.) The Databank offers these translation and interpretation services in thirty-five languages, "often at a moment's notice. . . . Emergency services are provided by volunteers. Linguists may charge an hourly rate for other services." (Defs.' Mem., Ex. B at 1.)

Dr. Ware testified that:

> Most of the referrals made by the Linguistic Databank in recent years concerned requests from members of the public or state or federal agencies for translators and/or interpreters in the following languages, in addition to English: Spanish, Lao, Cambodian, Japanese, Vietnamese, Korean, Thai, and Chinese (Mandarin and Cantonese).

(Defs.' Mem., Ex. B, Ware Aff. at 2.)

> To further clarify this statement, I offer the following information. Last year, the linguistic Databank received approximately 10-12 requests for assistance. Of these requests, approximately ninety-five percent were from persons who speak the eight languages listed above. Approximately half of the requests were from Spanish speakers.

(Pls.' Opp'n, Ex. 23, Ware Aff.)

Dr. Ware also testified at trial that while linguists may charge for their services, the vast majority of translation and interpretation services are provided by volunteers, at no cost to the non-English speaker in need of aid. He also testified that if the Department of Public Safety contacted the Project, the translation services would be free.

users of the Databank were among the languages into which the Alabama driver's license exam had been translated prior to 1992. *See* [*Id.*, Ex. 1, Hammond Dep. (sealed copies of Alabama driver's examination in Spanish, Lao, Cambodian, Japanese, Vietnamese, Korean, Thai, and Chinese, as well as Greek, Persian, German, Arabian, French and Polish)].

Contrary to the Defendants' assertion, there *is* a "principled way of limiting the number of languages in which the test can be given": [sic] provide the written driver's license exam in the ten most common foreign languages spoken in the state. "For language groups outside of the ten most common in Alabama – which are probably very few – applicants could be permitted to bring an interpreter to interpret the written exam. As demand increases for the provision of the exam in a language in which the exam is not already available, the state could have the exam translated and made available in that language." [Pls.' Opp'n, Ex. 20, Gonzalez Report at 5]. The fact that forty-eight states make some type of accommodation for non-English speakers further demonstrates the pretextual nature of this purported rationale. [*Id.*, Ex. 14, Driver's License Examination Survey Results].

(Pls.' Opp'n at 24-25) (emphasis in original).

Defendants replied to Plaintiffs' suggested alternatives by arguing that:

> Plaintiffs' attempt to limit the number of languages in issue is utterly unprincipled. Selecting the six or ten most common foreign languages not only begs the question why that number, and not another, was chosen, but also fails to accommodate those who do not speak the chosen language. In this regard, Lewis Ware's Affidavits are illustrative only; there is no reason to believe that only those languages may be in issue. The suggestion that languages not addressed be accommodated by allowing the applicant to bring an interpreter ignores the Department's bad experience with other interpreters. [*See* Defs.' Mem., Ex. D, Hamilton Aff. ¶ 7 (noting that Sign Language interpreters employed by the Department were giving deaf applicants answers to the examination)]. The Department lacks the personnel resources to verify that an applicant's interpreter is simply reading the test and not providing assistance.[80]

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[80] The fact that the Department had "bad experiences" with previous Sign Language interpreters is not persuasive, particularly because the Department's District Office in Mobile *chose* to contract with the particular group of interpreters with which it had problems. (Defs.' Mem., Ex. D at 3.) The Department has not stated that it had problems with Sign Language interpreters in other District Offices, nor have they pointed to any problems with interpreters during the years the Department administered foreign language examinations. Under the Defendants' reasoning, however, *all* interpreters would give applicants answers to examination questions.

Not only is that rationale specious, but as Dr. Gonzalez, who, as discussed above, is the Director of the National Center for Interpretation Testing, Research and Policy and the Director and Principal Investigator for the Federal Court Interpreter Certification Project noted, the use of translators outside of the Department to translate the written examination or provide translation services should not compromise the integrity of the examination:

> Professional translators have an ethical duty as members of their professional organizations, such as the American Translators Association and others, to

> Finally, no other applicants are permitted to use assistance not furnished by the Department.

(Defs.' Reply at 11.)

Plaintiffs responded to Defendants' critique by noting that:

> The Department claims that it "would be practically impossible for the state to accommodate the wide variety of languages of persons applying for a license." [Pls.' Tr. Ex. 5, Attorney General Opinion]. In effect, the Department argues that it need not provide the license examination

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> keep a document secure according to the guidelines of the client. Translators and interpreters play an integral role at all levels of local, state, and federal government activities. Without assured security, federal judges could never rely on the confidentiality of a translation of documents or tapes in numerous cases in which such translation is required for the administration of justice.

(Pls.' Opp'n, Ex. 22, Gonzalez Report at 4.)

In addition, the court notes that if the Department utilized volunteers to provide written translation services or translation services during the examination, the Department could require volunteers to sign confidentiality and non-disclosure agreements. Violations of such could be punishable under state law. *See, e.g.*, Ala.Code §§ 36-25-8, 36-25-27 (1975) (prohibiting the disclosure of confidential information by public officials and providing for penalties). Further, Dr. Gonzalez notes that Arizona and California, for example, have found the use of interpreters brought by the applicant to be the most cost-efficient and least disruptive way of dealing with the limited and non-English speaking public, and have reported no problems with the use of interpreters. (Pls.' Opp'n, Ex. 22, Gonzalez Report at 5.)

in *any* foreign languages because it cannot possible [sic] provide it in *all* foreign languages.

The law is not so blind. The fact that there may be a handful of people whose languages are too obscure to accommodate is not a reason to refuse to serve the thousands of persons whose languages are common in the state. *See Lau v. Nichols*, 414 U.S. at 572 (Blackmun, J., concurring) (English-only policy would not violate Title VI in a case "concerned with just a few youngsters, or with just a few youngsters, or with just a single child who speaks only German or Polish or any language other than English. . . . [N]umbers are at the heart of this case."); *Serna v. Portales Municipal Schools*, 499 F.2d 1147, 1154 (10th Cir. 1974) (recognizing that "only when a substantial group [of foreign language speakers] is being deprived [of their rights] will a Title VI violation exist"); *see also Valadez v. Graham*, 474 F.Supp. 149, 159 (M.D. Fla. 1979) (refusing to find a Title VI violation when only thirty-two migrant students were affected).

(Pls.' Post-Tr. Br. at 12-13) (emphasis in original). After again noting the limited range of foreign languages spoken in Alabama, and that ninety-five percent of requests for volunteer language assistance were from individuals speaking the eight languages outlined above, Plaintiffs again noted that these eight "were among those into which the Alabama driver's license exam had been translated prior to 1992." (*Id.* at 13.) The Plaintiffs then went on to note that:

> Linguists expert Dr. Roseann Gonzalez testified that the Department could easily provide the written driver's license exam in the ten most

common foreign languages spoken in the state. Indeed, prior to 1992, the Department gave the exam in fourteen foreign languages. [Pls.' Tr. Ex. 11]. For other language groups in Alabama, applicants could be permitted to bring an interpreter to the written exam. As demand increases for the provision of the exam in a new language, the state could have the exam translated into that language.[81] [*See* Pls.' Tr. Ex. 15, Gonzalez Report at 5; Gonzalez Test.]. The fact that forty-eight states make some type of accommodation for non-English speakers demonstrates the specious nature of the Department's rationale. [Pls.' Tr. Ex. 21].

The Department's claim that there are too many "dialects" to accommodate is exaggerated and reflects a misunderstanding of the issue. All languages have a standard written form that is understood by all speakers of the language, regardless of their native country or region. [*See* Gonzalez Test.]. In Spanish, for example, people from one country may use the word "carro" and people from a different country may prefer the work [sic] "automovil." But everyone who speaks Spanish understands that both words mean "car." Moreover, to the limited extent that particular words vary from country to country, alternative words can be provided. *Id.* For example, the Spanish exam previously administered by the Department provided some alternative Spanish words. [*See* Pls.' Tr. Ex. 13, Spanish Examination (providing both "pito" and "bocino" as alternatives for the English word

[81] As Colonel Hammond testified was done during his tenure at the Department.

"horn")]. In any event, any problems with dialect variations on the exams did not pose significant obstacles in the past; according to Lt. Byers, he worked around dialect problems by allowing the use of a translation dictionary.[82]

(Pls. Post-Tr. Br. at 13-14.)

Without deciding which practices would meet the requirements of Title VI, while also meeting the administrative concerns of the Department, the court simply notes that the Department currently does nothing, officially, to accommodate non-English speaking resident applicants.[83] Clearly, Plaintiffs have offered "comparably effective alternative practice[s] which result[ ] in less disproportionality," and, consequently, have met their burden under *Elston*, 997 F.2d at 1407. The court finds as much. As part of its Order, the court will direct the Department, in conjunction with the Plaintiffs, to devise practices that comply with Title VI while at the same [sic]

[82] Although Defendant's concede that the use of translation dictionaries is allowed, (Defs.' Post-Tr. Br. at 15), this fact is contrary to official policy. In practice, translation dictionaries are either not allowed at all, are allowed, but are retained by the examiner, or they may be retained by the applicant. Further, it is doubtful that allowing the use of translation dictionaries, on its own, would resolve the issues raised in this action. Dr. Gonzalez testified that having a translation dictionary may aid those applicants with some English skills, but would not aid those applicants with little or no English skills. As an example, she testified that certain specific driving-related words, such as "hydroplaning," would usually not appear in a translation dictionary.

[83] Testimony adduced at trial disclosed that contrary to official policy, some driver's licensing centers allowed the use of translation dictionaries.

comporting with the Department's administrative requirements. The Department, and not this court, is in a better position to examine its administrative constraints and formulate a policy that addresses both concerns.

ii. Examination integrity

Defendants argue that "[l]imiting the distribution of the tests protects the integrity of the examination. As [Lt.] Hamilton states, the Department does not generally distribute the examination to the community. While the examination is sometimes compromised, the Department should not be required to risk compromising the test more frequently. Distribution of the test increases the potential for compromise." (Defs.' Mem. at 10; *see also* Defs.' Reply at 12.) The court is unclear as to the meaning of the phrase "does not generally distribute." It implies that examinations are sometimes distributed. Obviously, if the English language examination were available to the community via targeted distributions, the "potential for compromise" would be increased. Defendants' language is ambiguous, however, it seems that Defendants are arguing that the utilization of professional and volunteer translators would increase the risk of compromising the examination. Defendants also appear to argue that non-English speakers are more likely to cheat on the examination than English speakers. Three examples offered by the Defendants support these constructions of Defendants' argument.

First, Defendants point to their previous "bad experience" with Sign Language interpreters utilized in the

Department's Mobile District Office. The court has disposed of this argument supra, note 80. Second, the Defendants cite to the Affidavits of Lieutenant Hamilton and Ronald Johnson, Driver's License Program Coordinator for the Georgia Department of Public Safety. (Defs.' Mem. at 10.) The portion of Lieutenant Hamilton's Affidavit upon which Defendants rely states as follows:

> With some Vietnamese applicants, the Mobile district office has detected cheating on the examination. It appears that the Vietnamese community has all six examinations that we administer translated. We have seen some applicants convert the answers into a dot-dash code and secrete the coded answers in dictionaries and elsewhere.

(Defs.' Mem., Ex. D, Hamilton Aff. at 3-4, ¶ 10.) The portion of Ronald Johnson's Affidavit relied upon by the Defendants states:

> From time to time, we have learned that the Georgia examinations have been compromised. In one instance, we procured a Polish-language translation through the University of Georgia in Athens. Shortly afterwards, we found that Polish applicants in Athens had a copy of the test prior to testing. More recently, we have been advised that illegal Latin American immigrants have a Spanish-language version of the test before they come to our driver's license facilities.

(Defs.' Mem., Ex. E, Johnson Aff. at 2, ¶ 5.)

Turning first to Defendants' reliance on Georgia's experience with their Polish examination, Georgia's isolated experience in its Athens, Georgia, office is irrelevant

to Alabama's administration of its driver's license examination. Assuming it is, however, Ronald Johnson testified at trial that the Georgia Department of Public Safety solved their problem by "scrambling" the questions – i.e., by placing them in different orders and utilizing several different examinations. He also testified that the Georgia Department learned from its experience with the Polish examination by instructing translators of its other foreign language examinations, for example Japanese and Bosnian examinations, to take additional precautions. Mr. Johnson reported no problems with either the Japanese or Bosnian examination. Further, as Plaintiffs note, "the Defendants were apparently not concerned about potential cheating when they sent the driver's license exam outside of the Department to be translated into American Sign Language." (Pls.' Opp'n at 28 n.27). Finally, as noted previously, concerns about the leakage of tests can be alleviated by employing professional translators who are subject to a code of ethics and by requiring them, as well as volunteer translators to sign confidentiality/non-disclosure agreements subject to penalty under state-law. *See supra* note 80. This is but one method of addressing examination integrity concerns.

As for the apparent contention that non-English speakers are more likely to cheat, the Defendants only conceded that English speaking applicants also cheat, (Defs.' Reply at 12), after Plaintiffs accused the Defendants of demonstrating "stereotypical biases against non-English speakers." (Pls.' Opp'n at 28; *see also Id.* at 26 (citing to *Miller v. Johnson*, 115 S.Ct. 2475, 2486 (1995)

(prohibiting racial and ethnic classifications based on stereotypes and noting that such classifications are "offensive and demeaning")).)

Further, the testimony of the Department's current and former employees belied the Defendants' contentions. Major Cottingham testified that he knew of no evidence that non-English speakers were *more likely* to cheat on the examination than English speakers. (Pls.' Opp'n, Ex. 2, Cottingham Dep. at 41.) In fact, when asked whether he was aware of any specific incidents of cheating by foreign applicants, he answered:

> No. I was just told that, you know, that there was some cheating going on with – with the applicants. But in fairness to everybody, there's cheating going on, you know, with the English and I guess anything else. People are going to cheat on the driver's license examination.
>
> Q: But you knew of no evidence that cheating was a bigger problem with foreign examinations?
>
> A: Not big – not bigger, no, sir.

(*Id.* at 42.) Colonel Hammond testified that during his tenure at the Department, copies of the English language examination were taken from the examination room and driver's license offices were burgled. (*Id.*, Ex. 1, Hammond Dep. at 21.) Maintaining the security of foreign language examinations was not a bigger problem than maintaining the security of the English examinations. (*Id.*) He testified at trial that examination integrity concerns applied equally to both English and non-English examinations.

Lieutenant Hamilton testified at trial that in addition to the cheating by Vietnamese applicants noted in his deposition, certain Asian applicants would get argumentative with Department officials. He admitted at trial, however, that English-speaking applicants also argued and cheated, but contended that "Orientals were worse." (Hamilton Test.) When questioned by the court, Lieutenant Hamilton admitted that other than typical administrative problems such as argumentative applicants and the longer time periods associated with applicants requiring special accommodations, such as illiterate, deaf, and other handicapped applicants, foreign language examinations imposed no other substantial burdens. Lieutenant Byers also confirmed at trial that cheating was detected with English speaking applicants as well as non-English speaking applicants.

In their proffer of their test integrity rationale, the Defendants have not met their burden of proving a "substantial legitimate justification" for the English-Only Policy. *Elston*, 997 F.2d at 1407 (citing *Georgia State Conference*, 775 F.2d at 1417). Although undoubtedly examination integrity is "legitimate, important, and integral to the defendant's institutional mission," *Id.* at 1413, the Defendants have failed to show a "manifest demonstrable relationship" to the challenged policy. *Id.* at 1412 (citing *Georgia State Conference*, 775 F.2d at 1418). Examination integrity could be maintained, as exemplified by the testimony of Defendants' witness Ronald Johnson, and the evidence discloses that both English speaking and non-English speaking applicants attempt to cheat on the examination; none more so than another.

Finally, even if it were true that non-English speakers cheated at a higher rate than English speakers, that fact alone would not justify the English-Only Policy. The court assumes that those applicants caught cheating are not given passing grades on the written portion of their examination. Preventing all non-English speaking residents from obtaining driver's licenses because a percentage of non-English speakers cheated – and are dealt with administratively – is not the solution, particularly because the Department still issues licenses to English speaking applicants even though it admits that English speaking applicants cheat.

d. Congress has never declared English to be the official language of the United States, consequently the Department's English-Only Policy is not a reflection of national policy, and, even if it were, does not justify the Policy

Although Defendants contend that "English is the national language of the United States," (Defs.' Mem. at 8; Defs.' Reply at 9-10), Plaintiffs correctly note that "[b]ills proclaiming English as the official language of the United States have repeatedly been introduced in Congress. All have failed." (Pls.' Post-Tr. Br. at 10 (citing Pls.'s Opp'n at 20 n.20 (citing bills)).)[84]

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[84] Although strong arguments can be made in support of establishing English as the official national language, patriotism, loyalty, or, for that matter, the ability to drive an automobile should not turn on whether it is or not. As the Arizona Supreme Court recently recognized: "The American tradition of tolerance 'recognizes a critical difference between

In support of their argument that English is the national language of the United States, Defendants cite to naturalization prerequisites requiring "an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language. . . . " (Defs.' Mem. at 8 (citing 8 U.S.C. § 1423)), and federal regulations requiring operators of commercial vehicles to demonstrate limited proficiency in the English language. (*Id.; see also* 49 C.F.R. § 391.11(b)(2).)

Turning to the naturalization requirements, it is obvious that becoming a United States citizen differs both qualitatively and quantitatively from obtaining a Class D driver's license in Alabama. Indeed, non-citizens may obtain Class D driver's licenses.

Naturalization involves, in part, the shifting of allegiances from one sovereign to another, and the granting of a multitude of civil rights and liberties not available to foreign nationals. The procedural and substantive requirements for naturalization are legislative decisions of Congress intended to, among other things, ensure loyalty to the new sovereign, *see, e.g.*, 8 U.S.C. § 1424, and to aid naturalized citizens in assimilating into American society. The legislative history of 8 U.S.C. § 1423 notes:

> Through the system of citizenship classes sponsored by the Immigration and Naturalization Service and the local school system, the alien is aided in preparing himself for citizenship, and every effort is made to give him fundamental

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encouraging the use of English and repressing the use of other languages.' " *Ruiz*, 1998 WL 203081 at *5 (quoting *Yniguez v. AOE*, 69 F.3d at 923).

> and uniform knowledge of our political and social structure. In order that he may intelligently use this fundamental and uniform knowledge and so that he may be a complete and thoroughly integrated member of our American society, the committee feels that he should have a basic knowledge of the common language of the country and be able to read, write, and speak it with reasonable facility.

1952 U.S.C.C.A.N. 1653, 1736. Becoming a citizen entails a long-term, if not life-time commitment to the United States. Accordingly, ensuring assimilation by providing for English proficiency may well be justified under that rationale. Indeed, in addition to requiring some English skills, § 1423(a) requires "a knowledge and understanding of the fundamentals of history, and of the principles and form of government, of the United States." 8 U.S.C. § 1423(a)(2). These concerns are simply not implicated in the Driver's License Division's testing of road skills and driving proficiency; its institutional mission. (*See* Hamilton Test. (testifying that safety is the main concern behind driver's license examinations).) Knowledge of American or Alabama history, or of the political structure of the United States or Alabama is not a prerequisite to obtaining a driver's license in Alabama. Further, in sections not quoted by the Defendants, 8 U.S.C. § 1423 provides for a multitude of exceptions and prohibits "extraordinary or unreasonable" conditions from being imposed. *See* 8 U.S.C. § 1423.

Defendants also cite to the requirement that those seeking to obtain a commercial driver's license be able to "read and speak the English language sufficiently to converse with the general public, to understand highway

traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records." (*Id.* (citing 49 C.F.R. § 391.11(b)(2).)) Defendants argue that "[i]f the United States can require commercial licensees to be conversant in English, how does the State of Alabama violate anyone's rights when it administers its written examinations for standard licenses only in English." (*Id.*)

First, commercial driver's licenses differ from Alabama's Class D driver's licenses in that federal commercial driver's license requirements regulate the operation of "vehicle[s] used on public highways in interstate commerce to transport passengers or property" when: (1) the vehicle has a gross weight rating of 4,537 or more kilograms (10,001 or more pounds); or (2) the vehicle is designed to transport more than fifteen passengers, including the driver; or (3) the vehicle is used in the transportation of hazardous materials. 49 C.F.R. § 390.5.

In contrast, Alabama's Class D licenses apply to non-commercial vehicles, excluding motorcycles. (*See* Pls.' Tr. Ex. 32, Alabama Driver's Manual at 3, 5.) In fact, Alabama itself distinguishes between Class D licenses and commercial driver's licenses. *See* Ala. Code §§ 32-6-49.8(d) and 32-6-49.10(b); Pls.' Tr. Ex. 32, Alabama Driver's Manual at 7. Holders of Class D licenses ordinarily cannot operate vehicles over the "commercial" weight limit, vehicles designed to transport more than fifteen passengers, including the driver, or vehicles used in the transportation of hazardous materials, as defined by the relevant statutes. In its Uniform Commercial Driver License Act, Alabama has promulgated its own laws regulating commercial motor vehicles that mirror

the federal regulations. *See* Ala. Code § 32-6-49.1 et seq.; *see also id.* at §§ 32-6-49.3(5), 32-6-49.8, 32-6-49.10. Other than the interest in safe driving skills and proper vehicular maintenance, the safety concerns inherent with the operation of "commercial" vehicles "on public highways in interstate commerce to transport passengers or property" are simply not present when it comes to the operation of personal vehicles under a Class D license.

Operators of commercial vehicles are required to interact with regulatory officials on a much more frequent basis than those with Class D licenses, (i.e., highway weigh-stations), and are required to maintain and submit various reports and records on a routine basis that are simply not required of holders of Class D licenses. *See, e.g.*, 49 C.F.R. §§ 390.15, 390.31, 390.35, 391.27, 391.51, 395.8, 397.19. Given these numerous reporting requirements, regulations requiring an understanding of English "to respond to official inquiries, and to make entries on reports and records," may well be justified. And, given the higher safety risk ostensibly posed by commercial vehicles that carry everything from schoolchildren to explosive chemicals, requiring a sufficient understanding of English to converse with the general public and to understand highway traffic signs and signals may well be justified on safety grounds.[85] Nevertheless, the court

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[85] Alabama utilizes international traffic signals that enable comprehension with little or no understanding of the English language. Given the nature of the federal commercial licensing regulations, however – the regulations address commercial vehicles involved in interstate travel – traffic signals may differ from state to state, requiring such a regulation to ensure understanding of potentially different signs.

notes that even given the much stronger rationales supporting the English requirement in 49 C.F.R. § 391.11(b)(2), the regulation has been challenged as violative of Title VI and is under review by the United States Department of Transportation. (Pls.' Opp'n, Ex. 22.) The court notes, however, that even if the federal government requires limited English comprehension for certain licenses, that does not absolve the State of Alabama from its legal and contractual obligation to abide by the dictates of Title VI and its regulations. *See supra,* Section C(3)(a).

Further, as Plaintiffs' note:

> Even if English *were* the "national language of the United States," providing translated driver's license exams does not conflict with that policy. To the contrary, the provision of the exam in foreign languages actually helps to *promote* English proficiency. *See* Exhibit 20 at pp. 1-3 (expert report of Dr. Gonzalez) (limiting access to a driver's license limits employment, the setting in which immigrants typically learn English, and limits interactions with English speakers in the community at large); Exhibit 1 at 18-19 (Hammond deposition) ("I felt that for [non-English speakers] to be assimilated into the mainstream of life in this state that a driver's license would be appropriate for their livelihood."); *see also Gutierrez v. Municipal Ct.*, 838 F.2d 1031, 1042 (9th Cir.1988), *vacated as moot*, 490 U.S. 1016 (1989) (rejecting as a valid state interest the defendants' claim that "the United States is an English-speaking country" and holding that "[t]hat self-evident fact provides little support for the restrictive [English-only] rule").

If the state's refusal to provide the exam in English were actually necessary to reflect a "national language" policy, the State would be compelled to cease all other communication in languages other than English. But the State publishes or distributes documents, notices, and brochures in a variety of foreign languages. *See* Exhibit 21 (notices and pamphlets distributed by Alabama Department of Public Health and the Alabama Development Office). According to Robert Sutton of the Alabama Development Office, the state prints or distributes brochures in a number of different languages in order to attract foreign investment.[86] Project managers who bring foreign investors to Alabama are free to hire translators to facilitate the visit. To make the visitors feel at home, Governor Fob James has recorded a video welcoming visitors with a voice-over in various languages. Given the numerous ways in which Alabama conducts its business in foreign languages, the English-only driver's license policy can hardly be deemed necessary to "reflect the national language."

(Pls.' Opp'n at 21-22.)

Thus, to the extent that Defendants' argument is based on the supposition that its English-Only Rule promotes assimilation into society, as Plaintiffs note, Dr. Gonzalez testified that it would actually have a contrary effect:

> The English Only rule promulgated by the Department of Public Safety . . . is a rule that serves no linguistically useful purpose and is

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[86] Mr. Sutton's deposition was taken on November 21, 1997, and has not yet been transcribed. [Footnote 22 in original].

counterproductive. Withholding a driver's license severely limits the ability of individuals to compete for, acquire, and maintain employment, as well as to carry out daily duties, such as driving themselves and others to school (to learn English and other important skills), driving to seek medical care for themselves and their children, driving to interact with social service agencies, and driving to attend religious services. These limitations not only interfere with survival, but they radically restrict normal interactions with English speakers in the community at large.

. . .

The English Only rule will not carry out the mandate of Amendment 509 "to preserve and enhance the role of English" in Alabama. First, a rule like Alabama's will severely retard the development of English by individuals who are limited or non-English speakers by denying access to employment. Employment is the primary way in which immigrants to this country acquire or learn English as a second language. From a sociolinguistic perspective, employment is viewed as the most significant factor that contributes to language shift (learning a new language at the expense of another). This is true both at the individual and group level.

. . .

Second, prohibiting limited and non-English speakers from obtaining a driver's license will likely create language ghettos populated by limited and non-English speakers who have not acquired English because of their exclusion from employment. These households are characterized by the U.S. Census Bureau as

"linguistically isolated" – those households where no member age 14 or older can speak English "very well." This isolation is usually a direct result of lack of daily interaction in the larger English-speaking community. These "linguistically isolated households" are factors in the perpetuation and maintenance of the foreign language and also have other long-term social and economic consequences. For example, the creation of language ghettos with a number of adults who cannot get to work and are not acquiring English will, in turn, increase the number of children whose acquisition of English will be retarded. This increases the number of limited-English proficient and non-English proficient children and adults who may require more linguistic assistance in educational and social service settings.

(Pls.' Opp'n, Ex. 20, Gonzalez Report at 2.)

The Defendants' national policy argument is not a "substantial legitimate justification" for its English-Only policy. *Elston*, 997 F.2d at 1407 (citing *Georgia State Conference*, 775 F.2d at 1417). The Defendants have not shown that Congress has declared English to be the official national language, and even if it were, have not shown how that fact would justify its policy as "legitimate, important, and integral to the defendant's institutional mission," *Id.* at 1413, nor how it bears a "manifest demonstrable relationship" to the challenged policy. *Id.* at 1412 (citing *Georgia State Conference*, 775 F.2d at 1418).

e. The Defendants' fiscal arguments fail

Finally, Defendants argue that:

> The State's resources are limited, and the requirement to administer examinations in foreign languages would be costly. . . . If the State is required to administer examinations in foreign languages, it will have to procure written translations of the examination in each language. In addition it will have to procure the capability of reading each foreign examination to an applicant unable to read and write in that language. . . . Plaintiffs would have the financially strained State of Alabama and Department of Public Safety procure tests and language capability and expend its personnel resources at the expense of performing other important functions. The Department, not plaintiffs or this Court, should decide how its budgetary and personnel resources are to be used.

(Defs.' Mem. at 9; *see also* Defs.' Reply at 9, 11; Defs.' Post-Tr. Br. at 5.) In support of their arguments, Defendants offered the Affidavit of Roscoe Howell, Commander of the Data Information Services Unit of the Department. (Defs.' Reply at 11.) He testified that the Department:

> received proposals from persons offering to provide translation services for deaf applicants. The offer was not one to provide free services, but rather offered the services for $50.00 per hour. The Department rejected the proposal because of its cost and concerns about test integrity, and

> instead developed a video test procedure using State resources.

(Defs.' Mem., Ex. F., Howell Aff. at 2.)

Defendants fail to address, however, the deposition testimony of Colonel Hammond, who stated that during his tenure as Chief of the Driver's License Division and Assistant Director of the Department, the Department incurred no costs in obtaining translations of the English language examination. Lieutenant Byers also testified that prior to 1992, the Department utilized a foreign language translation service that maintained a databank in Huntsville, Alabama where foreign language examinations were procured at no cost to the State. The evidence shows that the Department obtained translation services from volunteers such as individuals at the University of Alabama in Huntsville. (Pls.' Opp'n, Ex. 1, Hammond Dep. at 24.) Ronald Johnson testified that Georgia incurs no costs in obtaining translated version of its English language examination because the Georgia Department of Public Safety utilizes University of Georgia translators. As it has done in the past, the Department could seek translation services from individuals within the State's system of higher education, at no cost to the Department.

Plaintiffs point out that:

> Even if the state employed professional translators, it would cost approximately $10,000 to translate the exam into ten different languages with six versions of each language. [Pls.' Opp'n, Ex. 20, Gonzalez Report at 3. Dr. Gonzalez also noted that "If the [Department] did not require camera-ready copies, the cost to translate the exam into six versions of one foreign language

would be approximately $300. . . . If possible, Alabama could 'share' translated exams with other neighboring states so that quality tests could be produced at less cost. In the area of court interpreting, such a consortium of states currently shares expenses and expertise." *Id.*] Given that the total Department of Public Safety budget for fiscal year 1997-1998 is over nine million dollars, this figure is negligible. [*See* Pls.' Opp'n, Ex. 24 (DPS budget)].

Even assuming that the administration of the exam in foreign languages would entail some cost to the State, its interest in conserving its financial resources does not automatically trump all other concerns. *See Frontiero*, 411 U.S. at 690 ("administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality" under heightened scrutiny); *Graham v. Richardson*, 403 U.S. at 375 (State's "concern for fiscal integrity" not a compelling justification for state welfare laws discriminating against aliens). Nor would it justify the Defendants' refusal to allow examinees to bring, at their own expense, interpretation aids or certified translators.

(Pls.' Opp'n at 25-26.)

Plaintiffs' argument that the Department's fiscal concerns would not justify the prohibition of the use of interpretation aids or certified translators supplied by applicants, is well taken. Further, it is clear from the evidence that fiscal concerns were not a factor in the Department's decision to cease the administration of foreign language examinations. And, regardless of the dispute that arose at trial regarding the Department's exact

budget for fiscal year 1997-1998, the Defendants stipulated at trial that its budget was over $50 million dollars. *If* the Department decides that it wants to contract with professional translators rather than taking advantage of volunteers, as the Department did prior to 1992, the costs would be trifling. *Cf. United States v. Board of Trustees for the Univ. of Alabama*, 908 F.2d 740, 751 (11th Cir. 1990) ("In light of UAB's annual transportation budget of $1.2 million, an expenditure of $15,000, plus occasional amounts . . . is not likely to cause an undue burden on UAB").

Based on the foregoing, the court finds that Defendants' fiscal arguments do not establish a "substantial legitimate justification" for the English-Only Policy. *Elston*, 997 F.2d at 1407 (citing *Georgia State Conference*, 775 F.2d at 1417). Although fiscal matters are, in certain circumstances, "legitimate, important, and integral to the defendant's institutional mission," *Id.* at 1413, the Defendants have not shown that the fiscal implications of the English-Only Policy create such a circumstance. Further, it is clear that fiscal concerns played no part in the Department's cessation of foreign language examinations, and the Defendants have not shown a "manifest demonstrable relationship" to the challenged policy. *Id.* at 1412 (citing *Georgia State Conference*, 775 F.2d at 1418). Finally, even if Defendants have met their burden, the Plaintiffs have shown "comparably effective alternative practice[s] which would result in less disproportionality." *Id.* at 1407.

Dr. Gonzalez's conclusion in her report is an apt summary and analysis of the Department's English-Only Policy:

> Language policies should be rational, reasonable and fair to the population they impact, and consistent with the goals of the state or agency they serve. [They must, of course, also meet relevant legal requirements]. The [Department's] English Only rule satisfies none of these criteria. This rule promotes neither the intention of Amendment 509 to enhance the role of English in the state, nor does it protect the integrity of any examination or promote the welfare or safety of any community. It has the opposite effect. It retards the learning of English among this population, which also significantly jeopardizes the assimilation of limited and non-English speaking persons into the community, which is harmful in the long run to the state of Alabama and to the excluded population. The rule has an irreparable detrimental effect on persons of limited or no English proficiency. For all of these reasons, the policy should be more thoughtfully reformulated to provide reasonable accommodations to limited and non-English speakers.

(Pls.' Opp'n, Ex. 20, Gonzalez Report at 7-8.)

Based on the foregoing, the court finds that Defendants have failed to establish a "substantial legitimate justification" for its English-Only Policy. *Elston*, 997 F.2d at 1407. Or, if they have, the Plaintiffs should nevertheless prevail because they have shown "comparably effective alternative practice[s] which would result in less disproportionality." *Id.*

IV. CONCLUSION, JUDGMENT, AND DECLARATION

Although at trial the court granted Defendants' motion for judgment as a matter of law on Plaintiffs' intentional discrimination claims with the full agreement of the Plaintiffs, it could be inferred that because the State of Alabama knew, by their own admission, that their English-Only Policy may be in violation of Title VI and/or the Equal Protection Clause, that the State intends to treat resident non-English speakers differently than all other applicants for driver's licenses.

First, the evidence in this action clearly establishes that the State goes out of its way to aid illiterate English speaking applicants, deaf applicants, and handicapped applicants. Non-English speaking out-of-state drivers may drive in Alabama, and may obtain an Alabama driver's license without having to take the Department's examinations.

Second, the evidence establishes that the Department administered foreign examinations for over a decade, and encountered no significant problems in so doing. The former Chief of the Driver's License Division and former Assistant Director of the entire Department, Colonel Hammond, testified that there were no problems with the foreign language examinations, the program was expanded when demand was great enough, and translated examinations were obtained at no cost to the Department. He testified that he saw no reason for not providing foreign language examinations, and thought that it was a good program.

Third, the English-Only Policy was enacted after the enactment of Amendment 509, but before the Department sought an Attorney General's Opinion regarding the legality of the Policy. Not only was the Opinion issued eight months after the Policy went into effect, but the Attorney General's Opinion was written by an Assistant Attorney General who was concurrently serving as General Counsel to the Department and who was the individual who drafted the Department's request for an Attorney General's Opinion. The same person wrote the Department's request and the Opinion.

Finally, the Defendants' proffered justifications for the English-Only Policy fail in the light of reason. For example, the Defendants rely on the Attorney General's Opinion that states that safety concerns, including the ability to read and understand highway signs and the ability to understand the directions of law enforcement officers, evidently trump any possible problems with Title VI or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In addition to ignoring the Supremacy Clause to the United States Constitution, the Opinion fails to address why these concerns aren't relevant for illiterate English speaking applicants who cannot read and understand highway signs, or the ability, or lack thereof, of deaf applicants to understand the directions of law enforcement officers. Illiterate drivers cannot read, regardless of what language they speak, and deaf drivers cannot hear, regardless of the language they speak or understand.

At the least, the State could be chastised for failing to do a more thorough analysis of its policy. In retrospect, however, this may have made no difference, as the

English-Only Policy was already in effect at the time the Attorney General's office issued its Opinion, and the evidence suggests that although Attorney General Opinions in Alabama are advisory only, the Opinion regarding the Department's English-Only Policy was requested and issued because it served to protect the Director from liability. *See Broadfoot v. State*, 182 So. 411, 412 (Ala. Ct. App. 1938) ("[W]ritten opinions of the Attorney General are not controlling. They are merely advisory and, under the statute [Alabama Code § 36-15-19 (1975)], such opinions operate only to protect the officer to whom it is directed from liability because of any official act performed by such officer as directed or advised in such opinion."); *see also Hunt v. Tucker*, 875 F. Supp. 1487 (N.D. Ala. 1995); *Hunt v. Anderson*, 794 F. Supp. 1557, 1563 (M.D. Ala. 1992); *Hill Grocery Co. v. State*, 159 So. 269 (Ala. Ct. App. 1935); Defs.' Reply at 2 n.1.

Official English Laws have recently become common, although few have spawned state policies that have been challenged in the courts. Language laws have been struck down as violative of the Equal Protection guarantees of the Fourteenth Amendment or as violative of the First Amendment. *See, e.g., Lau v. Nichols*, 414 U.S. 563, 568-69 (1974); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Ruiz v. Hull*, 1998 WL 203081 (Ariz. April 28, 1998). Here, the court finds that the Alabama Department of Transportation's English-Only Policy violates Title VI; it unjustifiably impacts non-English speaking residents of Alabama on the basis of national origin.

Seventy-five years ago, in *Meyer v. Nebraska*, the Supreme Court addressed the constitutionality of a state statute that made it illegal to teach a language other than

English in public or private schools. Justice McReynolds observations are as applicable today as they were then:

> It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and 'that the English language should be and become the mother tongue of all children reared in this state.' It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.
>
> *That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution – a desirable end cannot be promoted by prohibited means.*

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:

> 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

> The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error.

Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) (emphasis added).

The court finds, and it is CONSIDERED, ADJUDGED and DECLARED that the Department's English-Only Policy violates Title VI of the Civil Rights Act of 1964. Accordingly, Plaintiffs' are entitled to their requested relief.

V. ORDER

Based on the foregoing, the court finds that Plaintiffs have met the criteria for the awarding of permanent injunctive relief: (1) violation of the applicable statute or regulatory authority by the Defendants; (2) continuing irreparable injury to the Plaintiffs in the absence of an injunction; and (3) lack of an adequate remedy at law. *See Newman v. State of Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Sierra Club v. U.S. Army Corps of Engineers*, 935 F. Supp. 1556, 1571-72 (S.D. Ala. 1996). The scope of injunctive relief should be tailored to address the specific violations of law by the Defendants. *See, e.g., Madsen v. Women's Health Ctr.*, 515 U.S. 753, 762 (1994); *cf. McKusick v. City of Melbourne, Fla.*, 96 F.3d 478, 484 n.5 (11th Cir. 1996).

Rather than mandate specific relief at this time, it is CONSIDERED and ORDERED as follows:

(1) Defendants' Motion for Judgment as a Matter of Law on Plaintiffs' Title VI claims be and the same is hereby DENIED.

(2) Plaintiffs' Motion For Leave To Amend Complaint be and the same is hereby GRANTED.

(3) The Alabama Department of Public Safety, its officers, agents, servants, employees, attorneys, and all

those in active concert or participation with them, be and the same are hereby PERMANENTLY RESTRAINED AND ENJOINED from enforcing or aiding, abetting, commanding, counseling or procuring the enforcement of the Department's English-Only Policy.

(4) The Director of the Department of Public Safety, in his official capacity, all those in active concert or participation with him; his agents, servants, employees, attorneys, and all those in active concert or participation with them, be and the same are hereby PERMANENTLY RESTRAINED AND ENJOINED from enforcing or aiding, abetting, commanding, counseling or procuring the enforcement of the Department's English-Only Policy.

(5) On or before July 20, 1998, the Defendants shall, in conjunction with the Plaintiffs, fashion proposed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses. Such proposed policies and practices shall be consistent with this Memorandum Opinion, and shall be amended, as necessary, to accommodate additional non-English speaking persons who are not now contemplated.

(6) The Parties shall submit their joint proposals to the court for its review and approval, as appropriate, on or before July 20, 1998.

(7) Should the Parties fail to agree on specific issues, those issues should be cataloged by each Party in a separate pleading, apart from the joint proposals. These separate pleadings shall be filed no later July 24, 1998. The exact issues upon which the Parties could not reach agreement should be specifically identified, and each

Party shall delineate its proposal(s), the justification(s) for its proposal(s), and any supporting authority. Grounds considered and rejected by the court in this Memorandum Opinion will not be considered by the court and should not be argued. Nor will the court entertain further arguments on the substantive merits of this action, such as additional proffered justifications for the English-Only Policy or additional evidence known to the Parties but not submitted to the court.

Should a Party intend to file a separate pleading outlining areas of disagreement, that Party shall file a pleading concurrent with the joint proposals filed July 20, 1998, notifying the court of that Party's intention to file a pleading within five days therefrom.

(8) On or before June 26, 1998, the Parties shall provide the court with a status report outlining the Parties' progress in formulating proposed policies and practices consistent with this Memorandum Opinion.

(9) Should the Parties fail to reach agreement as to proposed policies and practices consistent with this Memorandum Opinion, or should the Parties fail to formulate adequate proposals, the court will then mandate specific relief, and will employ court-appointed experts to aid the court in fashioning appropriate relief, with costs taxed as appropriate.

(10) The court retains jurisdiction over this action, and all of its aspects, pending further Order of the court.

DONE this the 3rd day of June, 1998.

/s/ Ira DeMent
UNIED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6598-II

MARTHA SANDOVAL, individually
and on behalf of all others
similarly situated,

Plaintiff-Appellee,

versus

L. N. HAGAN, in his official
capacity as Director of the
Alabama Department of Public
Safety, and ALABAMA DEPARTMENT
OF PUBLIC SAFETY,

Defendants-Appellants.

Appeal from the United States District
Court for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion ___, 11th Cir., 19__, ___F.2d___).

(Filed Febr. 29, 2000)

Before: HULL and MARCUS, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

Title 42, U.S.C:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(Pub.L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.)

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§ 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective

unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(Pub.L. 88-352, Title VI, § 602, July 2, 1964, 78 Stat. 252.)

CODE OF FEDERAL REGULATIONS
TITLE 28 – JUDICIAL ADMINISTRATION
CHAPTER I – DEPARTMENT OF JUSTICE
PART 42 – NONDISCRIMINATION; EQUAL EMPLOYMENT OPPORTUNITY; POLICIES AND PROCEDURES
SUBPART C – NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS – IMPLEMENTATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

28 C.F.R. § 42.104 Discrimination prohibited.

(a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies.

(b) Specific discriminatory actions prohibited.

(1) A recipient under any program to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;

(ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program; or

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or

substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this subpart.

(4) For the purposes of this section the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance shall be deemed to include any portion of any program or function or activity conducted by any recipient of Federal financial assistance which program, function, or activity is directly or indirectly improved, enhanced, enlarged, or benefited by such Federal financial assistance or which makes use of any facility, equipment or property provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and in paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) Employment practices.

(1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies, is to provide employment, a recipient of such assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities). That prohibition also applies to programs as to which a primary objective of the Federal financial assistance is (i) to assist individuals, through employment, to meet expenses incident to the commencement or continuation of their education or training, or (ii) to provide work experience which contributes to the education or training of the individuals involved. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to part III of Executive Order 11246 or any Executive order which supersedes it.

(2) In regard to Federal financial assistance which does not have providing employment as a primary objective, the provisions of paragraph (c)(1) of this section apply to the employment practices of the recipient if

discrimination on the ground of race, color, or national origin in such employment practices tends, on the ground of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving Federal financial assistance. In any such case, the provisions of paragraph (c)(1) of this section shall apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

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28 C.F.R. § 42.107 Conduct of investigations.

(a) Periodic compliance reviews. The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this subpart.

(b) Complaints. Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this subpart may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) Investigations. The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this subpart. The investigation should include,

whenever appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this subpart occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this subpart.

(d) Resolution of matters.

(1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this subpart, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 42.108.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this subpart, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subpart. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purpose of this subpart, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

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28 C.F.R. § 42.108 Procedure for effecting compliance.

(a) General. If there appears to be a failure or threatened failure to comply with this subpart and if the noncompliance or threatened noncompliance cannot be corrected by informal means, the responsible Department official may suspend or terminate, or refuse to grant or continue, Federal financial assistance, or use any other means authorized by law, to induce compliance with this subpart. Such other means include, but are not limited to: (1) Appropriate proceedings brought by the Department to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) Noncompliance with assurance requirement. If an applicant or recipient fails or refuses to furnish an assurance required under § 42.105, or fails or refuses to comply with the provisions of the assurance it has furnished, or otherwise fails or refuses to comply with any requirement imposed by or pursuant to Title VI or this subpart, Federal financial assistance may be suspended, terminated, or refused in accordance with the procedures of Title VI and this subpart. The Department shall not be required to provide assistance in such a case during the pendency of administrative proceedings under this subpart, except that the Department will continue assistance during the pendency of such proceedings whenever such assistance is due and payable pursuant to a final commitment made or an application finally approved prior to the effective date of this subpart.

(c) Termination of or refusal to grant or to continue Federal financial assistance. No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until: (1) The responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this subpart, (3) the action has been approved by the Attorney General pursuant to § 42.110, and (4) the expiration of 30 days after the Attorney General has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) Other means authorized by law. No action to effect compliance by any other means authorized by law shall be taken until: (1) The responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the action has been approved by the Attorney General, and (3) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance.

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28 C.F.R. § 50.3 Guidelines for the enforcement of Title VI, Civil Rights Act of 1964.

(a) Where the heads of agencies having responsibilities under Title VI of the Civil Rights Act of 1964 conclude there is noncompliance with regulations issued under that title, several alternative courses of action are open. In each case, the objective should be to secure prompt and full compliance so that needed Federal assistance may commence or continue.

(b) Primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance. Title VI itself and relevant Presidential directives preserve in each agency the authority and the duty to select, from among the available sanctions, the methods best designed to secure compliance in individual cases. The decision to terminate or refuse assistance is to be made by the agency head or his designated representative.

(c) This statement is intended to provide procedural guidance to the responsible department and agency officials in exercising their statutory discretion and in selecting, for each noncompliance situation, a course of action that fully conforms to the letter and spirit of section 602 of the Act and to the implementing regulations promulgated thereunder.

I. Alternative Courses of Action

A. Ultimate Sanctions

The ultimate sanctions under Title VI are the refusal to grant an application for assistance and the termination

of assistance being rendered. Before these sanctions may be invoked, the Act requires completion of the procedures called for by section 602. That section require [sic] the department or agency concerned (1) to determine that compliance cannot be secured by voluntary means, (2) to consider alternative courses of action consistent with achievement of the objectives of the statutes authorizing the particular financial assistance, (3) to afford the applicant an opportunity for a hearing, and (4) to complete the other procedural steps outlined in section 602, including notification to the appropriate committees of the Congress.

In some instances, as outlined below, it is legally permissible temporarily to defer action on an application for assistance, pending initiation and completion of section 602 procedures – including attempts to secure voluntary compliance with Title VI. Normally, this course of action is appropriate only with respect to applications for noncontinuing assistance or initial applications for programs of continuing assistance. It is not available where Federal financial assistance is due and payable pursuant to a previously approved application.

Whenever action upon an application is deferred pending the outcome of a hearing and subsequent section 602 procedures, the efforts to secure voluntary compliance and the hearing and such subsequent procedures, if found necessary, should be conducted without delay and completed as soon as possible.

B. Available Alternatives

1. Court Enforcement

Compliance with the nondiscrimination mandate of Title VI may often be obtained more promptly by appropriate court action than by hearings and termination of assistance. Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of assurances, covenants running with federally provided property, statements or compliance or desegregation plans filed pursuant to agency regulations, (2) a suit to enforce compliance with other titles of the 1964 Act, other Civil Rights Acts, or constitutional or statutory provisions requiring nondiscrimination, and (3) initiation of, or intervention or other participation in, a suit for other relief designed to secure compliance.

The possibility of court enforcement should not be rejected without consulting the Department of Justice. Once litigation has been begun, the affected agency should consult with the Department of Justice before taking any further action with respect to the noncomplying party.

2. Administrative Action

A number of effective alternative courses not involving litigation may also be available in many cases. These possibilities include (1) consulting with or seeking assistance from other Federal agencies (such as the Contract Compliance Division of the Department of Labor) having authority to enforce nondiscrimination requirements; (2) consulting with or seeking assistance from State or local

agencies having such authority; (3) bypassing a recalcitrant central agency applicant in order to obtain assurances from, or to grant assistance to complying local agencies; and (4) bypassing all recalcitrant non-Federal agencies and providing assistance directly to the complying ultimate beneficiaries. The possibility of utilizing such administrative alternatives should be considered at all stages of enforcement and used as appropriate or feasible.

C. Inducing Voluntary Compliance

Title VI requires that a concerted effort be made to persuade any noncomplying applicant or recipient voluntarily to comply with Title VI. Efforts to secure voluntary compliance should be undertaken at the outset in every noncompliance situation and should be pursued through each stage of enforcement action. Similarly, where an applicant fails to file an adequate assurance or apparently breaches its terms, notice should be promptly given of the nature of the noncompliance problem and of the possible consequences thereof, and an immediate effort made to secure voluntary compliance.

II. Procedures

A. New Applications

The following procedures are designed to apply in cases of noncompliance involving applications for one-time or noncontinuing assistance and initial applications for new or existing programs of continuing assistance.

1. Where the Requisite Assurance Has Not Been Filed or is Inadequate on its Face.

Where the assurance, statement of compliance or plan of desegregation required by agency regulations has not been filed or where, in the judgment of the head of the agency in question, the filed assurance fails on its face to satisfy the regulations, the agency head should defer action on the application pending prompt initiation and completion of section 602 procedures. The applicant should be notified immediately and attempts made to secure voluntary compliance. If such efforts fail, the applicant should promptly be offered a hearing for the purpose of determining whether an adequate assurance has in fact been filed.

If it is found that an adequate assurance has not been filed, and if administrative alternatives are ineffective or inappropriate, and court enforcement is not feasible, section 602 procedures may be completed and assistance finally refused.

2. Where it Appears that the Field Assurance Is Untrue or Is Not Being Honored.

Where an otherwise adequate assurance, statement of compliance, or plan has been filed in connection with an application for assistance, but prior to completion of action on the application the head of the agency in question has reasonable grounds, based on a substantiated complaint, the agency's own investigation, or otherwise, to believe that the representations as to compliance are in some material respect untrue or are not being honored,

the agency head may defer action on the application pending prompt initiation and completion of section 602 procedures. The applicant should be notified immediately and attempts made to secure voluntary compliance. If such efforts fail and court enforcement is determined to be ineffective or inadequate, a hearing should be promptly initiated to determine whether, in fact, there is noncompliance.

If noncompliance is found, and if administrative alternatives are ineffective or inappropriate and court enforcement is still not feasible, section 602 procedures may be completed and assistance finally refused.

The above-described deferral and related compliance procedures would normally be appropriate in cases of an application for noncontinuing assistance. In the case of an initial application for a new or existing program of continuing assistance, deferral would often be less appropriate because of the opportunity to secure full compliance during the life of the assistance program. In those cases in which the agency does not defer action on the application, the applicant should be given prompt notice of the asserted noncompliance; funds should be paid out for short periods only, with no long-term commitment of assistance given; and the applicant advised that acceptance of the funds carries an enforceable obligation of nondiscrimination and the risk of invocation of severe sanctions, if noncompliance in fact is found.

B. Requests for Continuation or Renewal of Assistance

The following procedures are designed to apply in cases of noncompliance involving all submissions seeking continuation or renewal under programs of continuing assistance.

In cases in which commitments for Federal financial assistance have been made prior to the effective date of Title VI regulations and funds have not been fully disbursed, or in which there is provision for future periodic payments to continue the program or activity for which a present recipient has previously applied and qualified, or in which assistance is given without formal application pursuant to statutory direction or authorization, the responsible agency may nonetheless require an assurance, statement of compliance, or plan in connection with disbursement or further funds. However, once a particular program grant or loan has been made or an application for a certain type of assistance for a specific or indefinite period has been approved, no funds due and payable pursuant to that grant, loan, or application, may normally be deferred or withheld without first completing the procedures prescribed in section 602.

Accordingly, where the assurance, statement of compliance, or plan required by agency regulations has not been filed or where, in the judgment of the head of the agency in question, the filed assurance fails on its face to satisfy the regulations, or there is reasonable cause to believe it untrue or not being honored, the agency head should, if efforts to secure voluntary compliance are unsuccessful, promptly institute a hearing to determine

whether an adequate assurance has in fact been filed, or whether, in fact, there is noncompliance, as the case may be. There should ordinarily be no deferral of action on the submission or withholding of funds in this class of cases, although the limitation of the payout of funds to short periods may appropriately be ordered. If noncompliance is found, and if administrative alternatives are ineffective or inappropriate and court enforcement is not feasible, section 602 procedures may be completed and assistance terminated.

C. Short-Term Programs

Special procedures may sometimes be required where there is noncompliance with Title VI regulations in connection with a program of such short total duration that all assistance funds will have to be paid out before the agency's usual administrative procedures can be completed and where deferral in accordance with these guidelines would be tantamount to a final refusal to grant assistance.

In such a case, the agency head may, although otherwise following these guidelines, suspend normal agency procedures and institute expedited administrative proceedings to determine whether the regulations have been violated. He should simultaneously refer the matter to the Department of Justice for consideration of possible court enforcement, including interim injunctive relief. Deferral of action on an application is appropriate, in accordance with these guidelines, for a reasonable period of time, provided such action is consistent with achievement of the objectives of the statute authorizing the

financial assistance in connection with the action taken. As in other cases, where noncompliance is found in the hearing proceeding, and if administrative alternatives are ineffective or inappropriate and court enforcement is not feasible, section 602 procedures may be completed and assistance finally refused.

III. Procedures in Cases of Subgrantees

In situations in which applications for Federal assistance are approved by some agency other than the Federal granting agency, the same rules and procedures would apply. Thus, the Federal Agency should instruct the approving agency – typically a State agency – to defer approval or refuse to grant funds, in individual cases in which such action would be taken by the original granting agency itself under the above procedures. Provision should be made for appropriate notice of such action to the Federal agency which retains responsibility for compliance with section 602 procedures.

IV. Exceptional Circumstances

The Attorney General should be consulted in individual cases in which the head of an agency believes that the objectives of Title VI will be best achieved by proceeding other than as provided in these guidelines.

V. Coordination

While primary responsibility for enforcement of Title VI rests directly with the head of each agency, in order to

assure coordination of Title VI enforcement and consistency among agencies, the Department of Justice should be notified in advance of applications on which action is to be deferred, hearings to be scheduled, and refusals and terminations of assistance or other enforcement actions or procedures to be undertaken. The Department also should be kept advised of the progress and results of hearings and other enforcement actions.

CODE OF FEDERAL REGULATIONS
TITLE 49 – TRANSPORTATION
SUBTITLE A – OFFICE OF THE SECRETARY OF TRANSPORTATION
PART 21 – NONDISCRIINATION IN FEDERALLY-ASSISTED PROGRAMS OF THE DEPARTMENT OF TRANSPORTATION – EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

49 C.F.R. § 21.5 Discrimination prohibited.

(a) General: No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, any program to which this part applies.

(b) Specific discriminatory actions prohibited:

(1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin:

(i) Deny a person any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to a person which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject a person to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat a person differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which persons must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program; or

(vii) Deny a person the opportunity to participate as a member of a planning, advisory, or similar body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of person to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program; may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with

respect to individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

(4) As used in this section the services, financial aid, or other benefits provided under a program receiving Federal financial assistance include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

(6) Examples demonstrating the application of the provisions of this section to certain programs of the Department of Transportation are contained in appendix C of this part.

(7) This part does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or

usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin.

(c) Employment practices:

(1) Where a primary objective of a program of Federal financial assistance to which this part applies is to provide employment, a recipient or other party subject to this part shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay or other forms of compensation or benefits, selection for training or apprenticeship, use of facilities, and treatment of employees). Such recipient shall take affirmative action to insure that applicants are employed, and employees are treated during employment, without regard to their race, color, or national origin. The requirements applicable to construction

employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(2) Federal financial assistance to programs under laws funded or administered by the Department which have as a primary objective the providing of employment include those set forth in appendix B to this part.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the grounds of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions of paragraph (c)(1) of this section shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) A recipient may not make a selection of a site or location of a facility if the purpose of that selection, or its effect when made, is to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this rule applies, on the grounds of race, color, or national origin; or if the purpose is to, or its effect when made will, substantially impair the accomplishment of the objectives of this part.

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49 C.F.R. § 21.11 Conduct of investigations.

(a) Periodic compliance reviews. The Secretary shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) Complaints. Any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary a written complaint. A complaint must be filed not later than 180 days after the date of the alleged discrimination, unless the time for filing is extended by the Secretary.

(c) Investigations. The Secretary will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) Resolution of matters.

(1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 21.13.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section the Secretary will so inform the recipient and the complainant, if any, in writing.

(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

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49 C.F.R. § 21.13 Procedure for effecting compliance.

(a) General. If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to: (1) A reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States

(including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) Noncompliance with § 21.7. If an applicant fails or refuses to furnish an assurance required under § 21.7 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph. However, subject to § 21.21, the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application approved prior to the effective date of this part.

(c) Termination of or refusal to grant or to continue Federal financial assistance. No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until:

(1) The Secretary has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means;

(2) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part;

(3) The action has been approved by the Secretary pursuant to § 21.17(e); and

(4) The expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action.

Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) Other means authorized by law. No action to effect compliance with Title VI of the Act by any other means authorized by law shall be taken by this Department until:

(1) The Secretary has determined that compliance cannot be secured by voluntary means;

(2) The recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and

(3) The expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days, additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

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(5)

No. 99-1908

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

1. The State policy at issue below – the Alabama Department of Public Safety's (the Department's) rule requiring that driver's license examinations be administered only in English – was adopted in 1991, more than a year after the ratification of an amendment to the Alabama Constitution declaring English to be "the official language of the state." ALA. CONST. amend. 509; *see* App. 58a – 60a. Prior to that time, Alabama – like forty-eight other states and the District of Columbia – administered its driver's license examination in numerous foreign languages. *See* App. 58a.[1] The State had obtained foreign language versions of the written examination at "no cost" and had encountered "no significant problems in administering" them prior to the change in policy. App. 59a.

2. Even after the adoption of the English-only rule, the Department continued to issue Alabama driver's licenses on a routine basis to new residents who could not speak or read English, as long as they had valid licenses from another state. App. 185a. Alabama simply refused to accommodate its own residents who were not fluent in English. "By providing special accommodations to illiterate applicants, handicapped applicants, [non-English speaking] out-of-state drivers with valid licenses and even foreign nationals with valid licenses, Alabama

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[1] West Virginia, the only other state that did not accommodate non-English speaking persons at the time of trial, reportedly began to offer foreign language versions of its examination in 1999. Phillip Rawls, *Court Agrees on Alabama Driving Tests*, AP, Dec. 1, 1999, *available in* LEXIS, Nexis Library, AP Online File.

single[d] out resident non-English speaking applicants by requiring them to take their examination in English only, without the aid of interpreters or translation aids." *Id.*

3. Shortly after the English-only driver's examination policy was adopted, the Alabama Attorney General issued an opinion stating that the policy "might be a violation of Title VI of the Civil Rights Act of 1964," citing this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974).[2] Nevertheless, the opinion supported the requirement, citing "consideration[s] of safety and the integrity of the licensing process." Neither of these considerations actually prompted the adoption of the Department's English-only rule. App. 10a.

4. The plaintiffs filed this lawsuit in 1996, alleging that the Department's English-only policy had an unjustified disparate impact on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d – 2000d-1, and its implementing regulations. The plaintiffs also alleged that the policy violated the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as enforceable pursuant to 42 U.S.C. § 1983. Plaintiffs sought only declaratory and injunctive relief.

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[2] The opinion accurately described *Lau* as holding "that a public school district receiving federal financial assistance violates Title 6 of the Civil Rights Act of 1964 where the school system fails to establish a program to deal with the language problem of students of Chinese ancestry who do not speak English." Pl. Ex. 5 at 2.

5. After a two-day trial, the district court held that the Department's English-only rule violated the Title VI disparate impact regulations of two federal agencies that provide millions of dollars of federal financial assistance to the Department. *See* 28 C.F.R. § 42.104(b)(2) (DOJ regulation); 49 C.F.R. § 21.5(b)(2) (DOT regulation). Specifically, the court found (1) that the English-only policy had a disparate impact on the basis of national origin; and (2) that the Department did not have a substantial, legitimate justification for its policy. At the commencement of the trial, the court had granted the Department's summary judgment motion on the plaintiffs' 42 U.S.C. § 1981 claim on the ground it was duplicative of the Equal Protection claim; however, it ultimately reserved ruling on the claim that intentional discrimination on the basis of language violated the Equal Protection clause. R3 – 80.

6. "Rather than mandate specific relief," the district court enjoined the Department from enforcing its English-only policy and directed it, "in conjunction with the Plaintiffs, [to] fashion proposed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses." App. 252a – 53a. Prior to the deadline for filing a status report "outlining the Parties' progress in formulating proposed policies and practices consistent with [the district court's] Memorandum Opinion," App. 254a, this Court granted certiorari in *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915, *writ dismissed as moot*, 524 U.S. 974 (1998), and the Department moved for a stay pending appeal. R3 – 71. The plaintiffs opposed the stay. R3 – 77. Before the district court ruled on the motion, the parties

filed and the district court granted a joint motion for a stay based upon an agreement between the parties. R3 – 82; R3 – 83. Under the terms of the agreement, the Department promised "to implement a program of testing in languages other than English," and the plaintiffs agreed that the program would "not be subject to the oversight of the District Court, [plaintiffs' counsel], or anyone else." R3 –-82. The Department reserved "the right to modify [its] interim program" during the pendency of the stay, and both parties reserved the right to press for a different remedy if and when the stay was lifted. R3 – 82.

7. On appeal, the court of appeals emphasized that the Department did "not contest any of the district court's findings of fact – either as to the disparate impact of the policy on non-English speaking license applicants or the pretextual nature of the policy justifications offered by the State." App. 49a. The court unanimously affirmed the judgment below, holding that "Title VI creates an implied private cause of action to obtain injunctive and declaratory relief under federal regulations prohibiting disparate impact discrimination." App. 57a. The court stated that its conclusion was "reinforced by Supreme Court case law and the uniform position taken by our sister circuits." App. 37a.

REASONS FOR DENYING THE WRIT

There are no compelling reasons that would justify granting the petition in this case. Petitioners have not challenged the conclusion of the court below that their

English-only policy violates the Title VI discriminatory effects regulations. Instead, they have limited their Petition solely to the question of the availability of a private right of action under the regulations. The mere fact that the Court granted certiorari on this question in *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915, *writ dismissed as moot*, 524 U.S. 974 (1998), does not mean that it should do so here. *See Ryan v. Powell*, 120 S. Ct. 579 (1999) (denying certiorari in case raising issue of the availability of private right of action under Title VI regulations). Like the petitioners in *Ryan v. Powell*, the petitioners here seek to involve the Court in litigation at the interlocutory stage. No remedial order has been entered in this case – a point that may raise questions about the Court's jurisdiction. And because this case, like *Ryan v. Powell*, involves a state agency that receives federal funds, 42 U.S.C. § 1983 will provide a remedy even if one is not available directly under the Title VI regulations.

Since the grant of certiorari in *Chester Residents*, few Title VI disparate impact cases have reached the courts of appeals. The two courts that have decided the issue – the Third and Eleventh Circuits – have concluded without dissent that private parties may bring actions for injunctive relief under the Title VI regulations. This result is not surprising. For more than two decades, private lawsuits to enforce the regulations have been part of the legal landscape. Following this Court's lead, the lower courts have consistently recognized that individuals may seek injunctive relief under the Title VI regulations, Congress has expanded the reach of Title VI with this remedy in mind, and the Executive branch has endorsed this equitable remedy as critical to the enforcement of the Civil

Rights Act. Because the decision below does not conflict with any decisions of this Court or the courts of appeals – including any decisions that have addressed English-only policies – there are no good reasons to engage in judicial revisionism this late in the day.

I. THE ORDER HERE IS INTERLOCUTORY

The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for certiorari).[3] Just as in the *VMI* case, the district court here "expressly declined to rule on the 'specific remedial course that the [defendants] should or must follow.' " *Id.* (citation omitted). "Rather than mandate specific relief," the district court ordered the Department, in consultation with the plaintiffs, to submit a remedial plan. App. 65a, 252a – 53a. Because the case was

[3] *See Texas v. Hopwood*, 518 U.S. 1033 (1996) (opinion of Ginsburg, J., respecting the denial of the petition for certiorari); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review."); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-258 (1916) (certiorari jurisdiction should be "exercised sparingly" and "except in extraordinary cases, the writ is not issued until final decree"); *American Const. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

stayed pending appeal, no remedial-plan has been submitted to the district court for its consideration.

Because the trial court has not entered final judgment, there may be a question about this Court's jurisdiction. In the court of appeals, the parties agreed that the court had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) on the basis of the order the district court had entered "enjoin[ing]" the Petitioners from "the enforcement of the Department's English-Only Policy." App. 253a.[4] Although the district court had declined to "mandate specific relief" until the Petitioners had an opportunity to submit a proposal "consistent" with the district court's opinion, App. 252a – 54a, the combination of circumstances present in this case sufficed to provide jurisdiction under Eleventh Circuit case law. *See, e.g., United States v. Alabama*, 828 F.2d 1532, 1536-38 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988). But other courts have held that an order to submit a plan, even when issued in conjunction with an order denominated as an injunction, is not sufficient. *See, e.g., El-Tabech v. Gunter*, 992 F.2d 183, 185 (8th Cir. 1993); *Sherpell v. Humnoke Sch. Dist. No. 5*, 814 F.2d 538, 539 (8th Cir. 1987).

Denying certiorari would protect the integrity of the Court's decision-making process. The general practice of denying interlocutory review does not rest simply on the policy of discouraging piecemeal litigation or reducing

[4] *See* Letter from Counsel to the Clerk of the United States Court of Appeals for the Eleventh Circuit (Mar. 26, 1999). The parties relied upon 28 U.S.C. § 1292(a)(1) rather than 28 U.S.C. § 1291 because the district court had reserved ruling on the Equal Protection claim.

the risk that appellate jurisdiction may be found lacking. It also rests on the importance of deciding cases in concrete settings. *See Texas v. Hopwood*, 518 U.S. at 1033 (opinion of Ginsburg, J., respecting the denial of the petition for certiorari) (citation omitted) (because the Court " 'reviews judgments, not opinions,' " it should "await a final judgment on a program genuinely in controversy"). Contrary to the suggestions of the Petitioners and their Amici,[5] the trial court here has not ordered the Department to use foreign languages. Instead, the court had ordered the Department merely to "fashion proposed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses." App. 253a; *see* App. 227a ("Without deciding which practices would meet the requirements of Title VI, while also meeting the administrative concerns of the Department, the court simply notes that the Department currently does nothing, officially, to accommodate non-English speaking resident applicants."). The trial court recognized that the "Department, and not th[e] court, is in a better position to examine its administrative constraints and formulate a policy that addresses [its] concerns." App. 228a. Although respondents anticipate that the Department ultimately will propose to use written foreign language exams because it has done so without difficulty or significant expense in the past, the Department has not been compelled to accommodate non-English speaking persons in

[5] *See* Pet. at 19; Brief of English Language Advocates and English First Foundation as *Amici Curiae* in Support of the State of Alabama at 2, 6-9 (Brief of English Language Advocates).

this way. Allowing the use of interpreters or translation dictionaries, for example, might be other options. Whatever the trial court ultimately orders, denying certiorari at this stage would "not, of course, preclude [the petitioners] from raising the same issues in a later petition, after final judgment has been rendered." *Virginia Military Inst. v. United States*, 508 U.S. at 946 (opinion of Scalia, J., respecting the denial of the petition for certiorari).

II. AS A PRACTICAL MATTER, PRIVATE PLAINTIFFS WILL BE ABLE TO ENFORCE THE TITLE VI REGULATIONS AGAINST STATE AGENCIES EVEN WITHOUT AN IMPLIED RIGHT OF ACTION

Like the plaintiffs in *Ryan v. Powell*, 120 S.Ct. 579 (denying certiorari in case raising issue of the availability of private right of action under Title VI regulations), the plaintiffs here brought suit for declaratory and injunctive relief against a state agency that receives federal financial assistance. Because the state official in charge of the agency could be sued in his official capacity for injunctive relief under 42 U.S.C. § 1983 for failing to adhere to the Title VI regulations, the availability of relief in a case such as this will not turn, as a practical matter, on the answer to the implied right of action question presented.

The district court here actually ruled that there were two alternative bases that would support the plaintiffs' claim for relief.[6] First, the court ruled that the Title VI

[6] At the time of trial, it was firmly established in the Eleventh Circuit that the Title VI disparate impact regulations

regulations created rights that could be enforced through 42 U.S.C. § 1983. App. 88a – 91a. *Powell v. Ridge*, 189 F.3d 387 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999), reached this result, as did Justice Stevens in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 645 (1983) (Steven, J., dissenting). *See also id.* at 608 (Powell, J., concurring) ("[M]ajority . . . would hold that proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself. And it would seem that the regulations may be enforced only in a suit pursuant to 42 U.S.C. § 1983. . . . "). Even absent an implied right of action, the law favors the availability of § 1983 claims because § 1983 is an "alternative source of express congressional authorization of private suits." *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) (citations omitted).

Second, the district court ruled that the plaintiffs had "a private right of action as third-party beneficiaries to contracts entered into by the Department that contain provisions requiring the Department to comply with federal non-discrimination laws as a condition of receiving federal funds." App. 112a. As authority for this proposition, the court cited, among other things, the former Fifth Circuit's opinion in *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 850 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) (citation omitted) (" 'Defendants by their contractual

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supported a private cause of action. *See* App. 38a ("We have recognized an implied private cause of action to enforce disparate impact regulations arising under Title VI three times."). As a result, there was no need for the plaintiffs to rely upon any alternative theories.

assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools.' "), a decision that this Court recognized as authoritative in *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979) ("a distinguished panel" decided *Bossier* "in an opinion that was repeatedly cited with approval and never questioned"). *See also Lau v. Nichols*, 414 U.S. 563, 571 n.2 (1974) (Stewart, J., concurring in result) (private plaintiffs could sue for injunctive relief "as beneficiaries of the federal funding contract"); Arthur R. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 Harv. C.R.-C.L. L. Rev. 1 (1983).

III. THERE ARE NO COMPELLING REASONS TO REVISIT A QUARTER CENTURY OF PRECEDENT

The decision below recognizing a private right of action under the Title VI regulations is consistent with the decisions of this Court and those of the courts of appeals. As this Court has recognized, Congress intended for Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to be enforced by private parties. *See Cannon v. University of Chicago*, 441 U.S. at 696 (Title IX private remedy "explicitly assumed" from private remedy for Title VI); *see also Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992) (Congress validated and relied upon private enforcement of Title VI when it passed 42 U.S.C. § 2000d-7). "[T]o effectuate the provisions" of Section 601, 42 U.S.C. § 2000d-1, "every Cabinet department and about 40 federal agencies [have] adopted

Title VI regulations prohibiting disparate-impact discrimination." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 592 n.13 (1983) (White, J., announcing the judgment of the Court). For more than two decades, the courts have recognized a private right of action to enforce the regulations. The Executive branch has endorsed the courts' view. And Congress, with full knowledge of the judicial construction, has approved and built upon it. Because lawsuits under the Title VI regulations have become part of the legal landscape, the Court should not revisit the issue in this case. *Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (recounting Court's acceptance of private right of action under SEC regulation, Rule 10b-5, in light of 25 year history of lower court recognition of such actions); *see generally Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (citation omitted) ("stare decisis has 'special force' in statutory interpretation").

In *Lau v. Nichols*, 414 U.S. 563 (1974), the Court's first case construing Title VI and its implementing regulations, the Court held that the San Francisco school system's policy of providing instructions only in English violated the rights of non-English speaking students to an equal educational opportunity. To Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, it was "not entirely clear that § 601 of [Title VI], standing alone, would render illegal" the school system's policy. *Id.* at 570 (Stewart, J., concurring). Because federal regulations "clearly" prohibited the English-only policy at issue, the "critical question" for Justice Stewart was "whether the regulations and guidelines promulgated by HEW [went] beyond the authority of § 601." *Id.* at 570-71. Emphasizing

the consistency of the agency's interpretation, Justice Stewart concluded that the regulations were valid and that private plaintiffs could sue for injunctive relief "as beneficiaries of the federal funding contract between" the federal government and the fund recipient. *Id.* at 571 n.2.

Bakke undercut the *Lau* majority's apparent assumption that Title VI, standing alone, reaches discriminatory effects claims. *See Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). But "no Justice in *Bakke* took issue with the view of the three concurring Justices in *Lau*, who concluded that even if Title VI itself did not proscribe unintentional racial discrimination, it nevertheless permitted federal agencies to promulgate valid regulations with such effect." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. at 591-92 (White, J., announcing the judgment of the Court). When the Court examined the issue again in *Guardians*, a majority of the Court concluded that the Title VI empowered federal agencies to make unlawful, through their implementing regulations, policies and practices that have unjustified discriminatory effects. *See id.* at 584 n.2, 593 (White, J., announcing the judgment of the Court); *id.* at 623 n.15 (Marshall, J.); *id.* at 643 (Stevens, J., joined by Brennan and Blackmun, JJ.).[7]

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[7] No challenge to the validity of the regulations themselves is before this Court. Petitioners did not press such a claim below; to the contrary, the court of appeals held that Petitioners had "concede[d] that the Department of Public Safety is subject to such [discriminatory effects] regulations." App. 36a; *see also* Pet. C.A. Br. 27-28. Consistent with their previous position, the Petitioners' "question presented" does not seek review of the validity of the discriminatory effects regulations, only their private enforcement. *See* Pet. i. The validity of the regulations is

A majority of the Court in *Guardians* also held that the disparate impact regulations could be enforced through private lawsuits. Two Justices reached this result under the regulations; *id.* at 584 n.2 (White, J., announcing the judgment of the Court); *id.* at 623 n.15 (Marshall, J., dissenting); three others relied upon 42 U.S.C. § 1983, but did not foreclose the implied right of action route. *See id.* at 645 and n.18 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). When summarizing the *Guardians* outcome in *Alexander v. Choate*, 469 U.S. 287 (1985), the difference in the source of the right of action against a state agency appeared to make little difference to the Court. As the Court explained in a unanimous opinion:

> No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact

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not "fairly included" within this question. *See Yee v. Escondido*, 503 U.S. 519, 535 (1992); *Missouri v. Jenkins*, 515 U.S. 70, 103 (1995) (O'Connor, J., concurring); *cf. Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (petition seeking review of elements of private right of action does not fairly include whether private right of action exists). Although there is some stray language in the Petition (Pet. 13-14, 17) that could possibly be read as posing a challenge to these regulations, this Court has explained that "the fact that [petitioner] discussed this issue in the text of its petition for certiorari does not bring it before us." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 n.5 (1993) (per curiam).

> on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.

Id. at 293 (footnote omitted).

It is quite fanciful for Petitioners to suggest that *Alexander* supports the view that the Title VI regulations can be enforced only through agency proceedings and not private litigation. *See* Pet. 12-13. As the *Alexander* Court explained, "to the extent our holding in *Guardians* is relevant to the interpretation of § 504 [of the Rehabilitation Act of 1973], *Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case." 469 U.S. at 294. Like *Alexander*, *Guardians* itself was a private action. Had the Court in *Guardians* meant to confine enforcement of the regulations to agency proceedings, it would have been unnecessary for a majority of the Justices to consider the form of relief available in private lawsuits.

Following *Guardians*, *Alexander*, and *Lau*, every circuit to explicitly consider the issue – the Third, Seventh, and Eleventh Circuits – has held that private parties may enforce the Title VI disparate impact regulations in suits for injunctive relief. *See, e.g.*, App. 37a – 42a; *Powell v. Ridge*, 189 F.3d 387, 397-400 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988) ("It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act."); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d

1403, 1417 (11th Cir. 1985). Every other circuit has recognized the same point.[8]

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[8] *See, e.g., Ferguson v. City of Charleston*, 186 F.3d 469, 479 n.10 (4th Cir. 1999) ("Although the statutory language of Title VI addresses only intentional discriminations, federal agencies that provide funds may prohibit disparate impact discrimination through regulations implementing Title VI."), *cert. granted on other grounds*, 120 S. Ct. 1239 (2000); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996) ("Although Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent."); *New York Urban League Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (evaluating the plaintiffs' claim under Title VI disparate impact regulations); *Latinos Unidos de Chelseaen Accion (LUCHA) v. Secretary of HUD*, 799 F.2d 774, 785 (1st Cir. 1986) (evaluating the plaintiffs' claim under Title VI disparate impact regulations); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 981-83 (9th Cir. 1984) (noting that a majority of Justices in *Guardians* held that "proof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute, rather than the statute itself"); *Castaneda by Castaneda v. Pickard*, 781 F.2d 456, 466 n.11 (5th Cir. 1986) ("Thus a Title VI action can now be maintained in either the guise of a disparate treatment case, where proof of discriminatory motive is critical, or in the guise of a disparate impact case, involving employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another."); *see also Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996) (noting in dicta that "[a] plaintiff may pursue a claim under a disparate impact theory as well"); *Adams v. Bell*, 711 F.2d 161, 167 n.35 (D.C. Cir. 1983) (en banc) ("private suits provide an appropriate and effective mechanism for judicial consideration of compliance with Title VI"), *cert. denied*, 465 U.S. 1021 (1984); *Miener v. State of Missouri*, 673 F.2d 969, 973-976 (8th Cir.), (recognizing private remedy under § 504 of Rehabilitation Act in light of weight of authority and incorporation of

In addition to recognizing that Title VI regulations may be privately enforced, the courts of appeals have applied the same legal standards in analyzing the cases.[9] Contrary to the Petitioners' suggestions (Pet. 6), there has been no explosion of litigation. Since the decision in *Lau* 26 years ago, the courts of appeals have decided only 14 Title VI disparate impact cases on the merits.[10] In only

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Title VI remedies), *cert. denied*, 459 U.S. 909 (1982); *but cf. New York City Envtl. Justice v. Giuliani*, 214 F.3d 65 (2d Cir. 2000) (availability of a private right of action an open question in the Second Circuit).

[9] Plaintiffs are required to make a prima facie showing that a facially neutral practice has a racially disproportionate impact. If plaintiffs meet that initial burden, the defendants must demonstrate a substantial, legitimate justification for the policy. If defendants can so demonstrate, plaintiffs must then show that there is an equally effective alternative practice that results in less racial disparity or that the defendants' practices are a pretext for discrimination. *See, e.g., Powell v. Ridge*, 189 F.3d at 393-94; *Ferguson v. City of Charleston*, 186 F.3d at 480; *Larry P. v. Riles*, 793 F.2d at 982; *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d at 1417.

[10] In addition to this case, those cases are: *Ferguson v. City of Charleston*, 186 F.3d 469; *Caractor v. Town of Hempstead*, 159 F.3d 1345 (2d Cir. 1998); *Villanueva v. Carere*, 85 F.3d 481; *City of Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993); *Quarles v. Oxford Municipal Separate School District*, 868 F.2d 750 (5th Cir. 1989); *Latinos Unidos de Chelseaen Accion (LUCHA) v. Secretary of HUD*, 799 F.2d 774; *Craft v. Board of Trustees of the Univ. of Illinois*, 793 F.2d 140 (7th Cir.), *cert. denied*, 479 U.S. 829 (1986); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403; *Larry P. v. Riles*, 793 F.2d 969; *Castaneda v. Pickard*, 648 F.2d 989; *NAACP v. Medical Center Inc.*, 657 F.2d 1322 (3d Cir. 1981); *Guardians Ass'n of New York City Police Dept. v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980), *aff'd*, 463 U.S. 582 (1983).

one of those cases, besides this one, did the plaintiffs prevail.[11] The relatively small number of cases and the consistency of their outcomes reflects that private lawsuits enforcing the Title VI regulations are not unmanageable. *Cf. Cannon v. University of Chicago*, 441 U.S. at 709 (victims of discrimination "have had private Title VI remedies available at least since 1965 . . . respondents have not come forward with any demonstration that Title VI litigation has been so costly or voluminous that . . . the courts have been unduly burdened").

The footnote in *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), to which Petitioners point for support, *see* Pet. at 15-16, does not signal a retreat from the conclusion that private parties may enforce agency regulations.[12] The plaintiffs in *Fordice* did not raise a disparate impact claim because the case concerned the proper remedy in the case of a university system that had engaged in *intentional* discrimination. Although the Court in *Fordice* held that

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[11] That case was *Larry P. v. Riles*, 793 F.2d 969.

[12] The relevant portion of the *Fordice* footnote upon which Petitioner relies reads as follows:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to "take affirmative action to overcome the effect of prior discrimination." Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. [citing opinions in *Guardians* and *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978)]. We thus treat the issues in these cases as they are implicated under the Constitution.

United States v. Fordice, 505 U.S. at 732 n.7.

Title VI "affirmative action" regulations did not impose a different substantive standard than the Constitution in that context, it did not question the right of private parties to sue to enforce those regulations. *Cf. Bazemore v. Friday*, 478 U.S. 385, 407 (1986) (adjudicating on the merits private plaintiffs' claim that fund recipient was not complying with regulations promulgated pursuant to Title VI). Finally, as the court below noted, the fact that the *Fordice* opinion was "authored by Justice White, the crucial fifth vote" in *Guardians* makes it particularly unlikely that the *Fordice* Court intended to change the law "in so oblique a manner." App. 47a, n.24.

What makes the Petitioners' suggestion – that *Fordice* was intended to signal a retreat from *Lau*, *Guardians*, and *Alexander* – all the more remarkable is the fact that the Court has continued to rely upon Justice White's conclusion in *Guardians* that private plaintiffs could obtain injunctive relief in a suit brought to enforce the Title VI discriminatory effects regulations. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) ("Justice White's opinion announcing the Court's judgment in *Guardians Ass'n v. Civil Serv. Comm'n for New York City*, for instance, concluded that the relief in an action under Title VI alleging unintentional discrimination should be prospective only"). Significantly, *Gebser* was decided after the Court granted certiorari in the *Chester Residents* case.

Permitting a private right of action for injunctive relief to enforce the Title VI regulations is not inconsistent with the statute, nor would it make the administrative enforcement procedures under § 602 of the Act, 42 U.S.C. § 2000d-1, redundant as the Petitioners' repeatedly claim. *See* Pet. at 12-13. The administrative procedures were

intended to serve as a check on the power of federal agencies to terminate federal funds, not as a barrier to private enforcement actions for injunctive relief under Title VI. *See* 42 U.S.C. § 2000d-1; *Cannon v. University of Chicago*, 441 U.S. at 704-06; *see also Newman v. Piggie Park*, 390 U.S. 400, 401-02 (1968) (per curiam) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."). Just as private actions alleging intentional discrimination under Title VI are not inconsistent with the existence of the statutory administrative procedures that federal agencies must follow when they address charges of intentional discrimination, *see Cannon v. University of Chicago*, 441 U.S. at 705-06 ("award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with – and in some cases even necessary to – the orderly enforcement of the statute"), so too are private actions to enforce the Title VI regulations not inconsistent with the statutory scheme.

The Department of Justice, one of the two agencies whose regulations are at issue here, has taken the position in this case that providing a private remedy for injunctive relief is not inconsistent with the Title VI statutory scheme. *See* Brief for the United States as Intervenor and as *Amicus Curiae* at 30-33, *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) (No. 98-6598). This Court recognized the importance of the Government's view in this regard in *Cannon*, noting that the agency charged with administering the statute in that case "perceives no inconsistency between the private remedy and the public remedy. On

the contrary, the agency takes the unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes." *Cannon v. University of Chicago*, 441 U.S. at 706-707.

When Congress passed the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, it validated and relied upon the courts' decisions that private parties may enforce the statutory prohibition against discrimination contained in Section 601 of Title VI. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. at 72; *id.* at 78 (Scalia, J., concurring) (citation omitted) (the Act " 'must be read . . . as a validation of *Cannon's* holding' "). When Congress passed the Civil Rights Restoration Act of 1987, it likewise acquiesced in and relied upon the courts' decisions that private parties may enforce agency regulations designed "to effectuate the provisions of" Section 601. 42 U.S.C. § 2000d-1. "When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts . . . Congress need not have intended to create a new remedy, since one already existed . . . [rather] the question is whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, 456 U.S. 353, 378-79 (1982).

Congress enacted the Restoration Act to expand the reach of Title VI in response to the decision in *Grove City College v. Bell*, 465 U.S. 555 (1984). At the time that Congress passed the Act – a decade after *Guardians* and *Alexander* had been decided – it knew that the courts had held that the Title VI regulations could be enforced by

private plaintiffs. This conclusion does not rest "on attributed rather than actual congressional knowledge." *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. at 77 (Scalia, J., concurring). During extensive congressional debates, opponents of the bill relied on the fact that the regulations were privately enforceable in order to raise the spectre that broadening the scope of Title VI would spur additional lawsuits against federal funding recipients.[13] The point was hammered home to Congress by the Executive branch. In a memorandum by the Office of Management and Budget that was submitted to Congress during the hearings, the Administration commented that "[the bill] would . . . open all of a recipient's activities to private lawsuits over practices deemed to have 'discriminatory effects,' regardless of intent." *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 532 (1984); *see also id.* at 527 (emphasis in original) ("every

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[13] Senator Hatch, for example, warned that just as federal agencies could bring administrative enforcement actions against states that engage in practices having a disparate impact on minorities, "advocacy groups will be able to bring private lawsuits making the same allegations before federal judges." 134 CONG. REC. 2,421 (1988); *see also* 130 CONG. REC. 18,880 (1984) (statement of Rep. Fields that "a State [will] be subject to private lawsuits because the tests have a disproportionate impact on minorities"); *Civil Rights Act of 1984: Hearing on S. 2568 Before the Subcomm. on Const. of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 153 (1984) (testimony of opponent of bill that Title VI and the other civil rights statutes "have been expanded through regulation and court decisions to cover the effects of discrimination, and the result of these amendments would be to greatly expand the coverage of effects test type protection to areas where it does not exist").

licensed attorney would be empowered to file suit to enforce the 'effects test' regulations of agencies, challenging practices in *every* aspect of *every* institution that receives *any* Federal assistance").

Despite the dire warnings of opponents of the legislation, Congress passed the Restoration Act. The fact that Congress knew that the Title VI discriminatory effects regulations were uniformly viewed as privately enforceable, yet expanded the coverage of the Act without changing that view, is strong evidence that Congress intended to preserve the remedy. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, 456 U.S. at 381-82 ("[T]he fact that a comprehensive reexamination and significant amendment of [an act of Congress] left intact the statutory provisions under the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."); *see also Faragher v. City of Boca Raton*, 524 U.S. at 792 ("[T]he force of precedent here is enhanced by Congress' amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding."); *Bob Jones University v. United States*, 461 U.S. 574, 601 (1983) ("In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provided added support for concluding that Congress acquiesced in the IRS rulings of 1970 and 1971.").

"This Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication." *Cannon v. University of Chicago*, 441 U.S. at 706 n.40; *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. at 730 (SEC regulation). Given that-

Congress has accepted and the Executive branch has endorsed the federal-court recognition of a cause of action for injunctive relief under the Title VI regulations, the case for continuing to do so is quite compelling. This Court should not revisit the issue.

IV. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS THAT HAVE ADDRESSED ENGLISH-ONLY POLICIES

Contrasting the decision here with the decisions in *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999), and *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994), Petitioners complain that they have been "directed to do something" that other courts have not required federal agencies to do – namely, print forms in English. Pet. at 19. Taking the complaint one step further, *Amici* contend that the decision below is "in direct conflict with at least four other circuits that have found no generalized requirement in Title VI for examinations, services, or notices to be in languages other than English." Brief of English Language Advocates at 6-7. They point to *Nazarova* and *Toure* as well as to *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975), and *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973). Brief of English Language Advocates at 7. If the decision here is allowed to stand, *Amici* argue, it "will endanger hundreds of state and local governmental policies which require the use of English." *Id.* at 3.[14]

[14] *Amici* also contend that the court below "equated language and national origin." Brief of English Language Advocates at 4. Even a cursory examination of the opinion will reflect that this contention is false. *See* App. 51a – 52a; *see also* App. 157a ("correct analysis . . . is not whether language equals national origin, but whether the policy . . . has an unjustified disparate impact").

There are three major problems with these contentions. First, they focus not on the availability of an implied right of action under the Title VI regulations, but on the applications of the regulations to English-only policies. Because Petitioners have elected to seek review solely on the implied right of action question, they have forfeited any broader claims regarding the validity of those regulations or their application to the English-only policy in this case. *See* Sup. Ct. R. 14.1(a); *see also supra* p. 12 note 7.

Second, the Petitioners and their *Amici* misunderstand the district court's order. The Petitioners were not "directed" to speak in foreign languages, only to develop a plan to accommodate those who do. *See* App. 253a; *see also* App. 227a ("without deciding which practices would meet the requirements of Title VI, while also meeting the administrative concerns of the Department, the court simply notes that the Department currently does nothing, officially, to accommodate non-English speaking resident applicants").

Third, the cases upon which Petitioners and their *Amici* rely are not on point. None of them even raise Title VI claims. *Nazarova*, *Toure*, and *Carmona* were procedural due process challenges (and in the case of *Carmona*, an equal protection challenge) to the practice of providing various governmental notices in English only. *Frontera* raised an equal protection challenge to the practice of

giving a civil service examination only in English. Factually, the cases were quite different from the instant one. In cases such as *Nazarova*, *Toure*, and *Carmona*, the courts have emphasized that governmental notices in English are sufficient, as long as they are reasonably calculated to put the recipients on notice that further inquiry is required, because the recipients are free to have the notices translated for themselves. In this case, the plaintiffs had no such opportunity because the Petitioners' English-only policy prohibited any form of "self-help" on the part of the applicants, including bringing someone to interpret the examination or even using a translation dictionary. App. 170a – 171a. In *Frontera*, the civil service examination case, the burden of translation was substantial, and the job at issue required familiarity with English terms. *See Frontera v. Sindell*, 522 F.2d at 1218-19. Here, the burden of translation was minimal, and English is not a prerequisite. Indeed, Petitioners routinely issue Alabama drivers' licenses to persons who cannot understand a word of English as long as those persons have valid out-of-state licenses.

The facts here are important because they serve as a reminder that plaintiffs in Title VI disparate impact cases are likely to prevail only in those rare instances where a recipient of federal financial assistance acts with little justification. The Department's English-only policy was virtually unique. Forty-eight other states, the District of Columbia, and Alabama itself prior to 1991 had no such rule. The operation of the policy was bizarre. "By providing special accommodations to illiterate applicants, handicapped applicants, [non-English speaking] out-of-state drivers with valid licenses and even foreign nationals

with valid licenses, Alabama single[d] out resident non-English speaking applicants by requiring them to take their examination in English only, without the aid of interpreters or translation aids." App. 185a. More than four years before the case was filed, the Alabama Attorney General recognized that the Department's restrictive policy "might be a violation of Title VI of the Civil Rights Act of 1964," citing this Court's decision in *Lau*.[15] At trial, the Department's explanations for its policy were riddled with inconsistencies. On appeal, the Department did "not contest *any* of the district court's findings," including its conclusion that the Department's "rationales were a pretext." App. 10a – 11a (emphasis in original). Few cases will be as compelling as this one.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[15] The fact that the Petitioners knew that their English-only policy was suspect before this suit was filed undercuts their suggestion that they were somehow blindsided by this case. *See* Pet. at 5, 13, 18.

Supreme Court, U.S.
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No. 99-1908

In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This case presents the question whether Congress intended to create a private cause of action that would allow private individuals to sue State agencies that receive federal funds to enforce disparate impact regulations promulgated by federal agencies pursuant to Section 602 of the Civil Rights Act of 1964. As the question states, those private lawsuits bypass the federal agency review and enforcement procedures that Congress established in the text of Section 602. *See* App. at 258a. In this case, the Eleventh Circuit Court of Appeals held that private individuals could sue the Alabama Department of Public Safety and require it to modify its practice of giving the written examinations for private driver's licenses only in the English language so as to avoid engaging in a practice alleged to have a disparate impact based on national origin. As a result, the federal courts have told the Department to make accommodations, even though the grantor federal agencies never invoked the statutorily-specified agency review and enforcement procedures.

The issues raised by the Petition are of fundamental importance. Federal agencies make a multitude of grants each year. An implied private right of action would expose all of the grantees to lawsuits coming from a wide range of directions. Contrary to Respondent's contention, the number of Title VI disparate-impact lawsuits against federal grantees is increasing. The federal agencies are also becoming more active. Amici Washington Legal Foundation and Allied Educational Foundation cite draft guidance published by the Environmental Protection Agency and the United States Department of Education

as well as a July 14, 1994 Memorandum from Attorney General Janet Reno to all "heads of departments and agencies that provide federal financial assistance" instructing them to "ensure that the disparate impact provisions in your regulations are fully utilized." Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Petitioners at 16-17, *Alexander v. Sandoval* (No. 99-1908).[1] The Eleventh Circuit's ruling opens the door to a flood of litigation.

The Eleventh Circuit's ruling not only allows private litigants to sue federal grantees, it gives them a new basis for doing so. The Eleventh Circuit affirmed a District Court ruling that linked language to national origin through a disparate impact analysis. As a result, the federal courts have prohibited the Alabama Department of Public Safety from testing driver's license applicants only in English and have required it to provide written examinations in foreign languages. What else must federal grantees translate to avoid having a disparate impact based on national origin, and into what languages?

Grantees faced with language claims will also be treated differently in the Eleventh Circuit. The Second, Fifth, and Seventh Circuits have declined to equate language to national origin. *See Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. den.*, 466 U.S. 929 (1984); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686, 687 (5th Cir. 1981); *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999). Each

[1] The United States intervened in the Eleventh Circuit in support of Respondent.

of those courts has refused to make a public agency translate forms into foreign languages. Grantees in the Eleventh Circuit can now be required to do so.

Four amicus briefs urging this Court to grant certiorari – filed by English Language Advocates and English First Foundation, by Pacific Legal Foundation and the Center for Equal Opportunity, by Washington Legal Foundation and Allied Educational Foundation, and by U.S. English – attest to the importance of the question presented.

In this Reply Brief, Petitioners respond to the suggestions that the courts have answered the question presented and that this case is not ready for this Court's review. First, put simply, this Court has not answered the question presented, and, two years ago, it granted certiorari in *Seif v. Chester Residents Concerned for Quality Living, cert. granted*, 524 U.S. 915 (1998), *cert. dismissed as moot*, 524 U.S. 974 (1998), for that reason. Second, Petitioners filed their appeal after a trial on the merits and appealed from an injunction that had both prohibitive and directive elements. There are no procedural barriers to review. Finally, the application of the disparate impact regulations in this case is fairly embraced in the question presented because it shows the consequences of bypassing the remedial scheme that Congress enacted in Section 602.

1. Respondent's suggestion that this Court should not revisit 25 years of precedent, Br. in Opp. 11-26, is misleading because this Court has no such body of precedent. This Court granted certiorari only two years ago in *Seif v. Chester Residents Concerned for Quality Living*, No.

97-1620, in order to resolve the same question that this case presents. If the existence of an implied private right of action to enforce agency regulations had been clearly established in 1998, there would have been no reason to grant certiorari. Moreover, in *Chester Residents*, this Court granted certiorari in the face of most of the same arguments that Respondent now makes in this case. *See* Brief in Opposition to Petition for Writ of Certiorari at 9-12, 14-15, *Seif v. Chester Residents Concerned for Quality Living* (No. 97-1620).

Contrary to Respondent's suggestion, this Court has not resolved the question. Only two circuit courts of appeals (the Eleventh Circuit in this case and the Third in *Chester Residents*) have explained how they reached the conclusion that there is an implied private right of action under Section 602, and neither of them states that this Court has answered the question. *See* App. at 42a ("[T]he Court has yet to squarely answer the question before us. . . . "); *Chester v. Residents*, 132 F.3d at 932 ("[T]he applicable Supreme Court precedent is not dispositive. . . . "). Accordingly, the only precedent is that established by the courts of appeals. But, only two courts of appeals have explained their conclusion, and this Court vacated the Third Circuit's decision. *See Chester Residents*, 524 U.S. 974 (1998). Moreover, the courts of appeals were in accord when this Court granted certiorari in *Chester Residents* demonstrating that a conflict in the circuits is not a prerequisite for certiorari when the Petition presents an important question of federal law that this Court has not resolved. *See* Sup. Ct. R. 10(c).

Alexander v. Choate, 469 U.S. 287 (1985), summarized the then-existing Title VI jurisprudence. The Court did

not state that either *Lau v. Nichols*, 414 U.S. 563 (1974), or *Guardians Assn. v. Civil Service Comm'n. of New York*, 463 U.S. 582 (1983), resolved the question. Rather, it said, "No opinion commanded a majority in Guardians, and Members of the Court offered widely varying interpretations of Title VI." *Alexander*, 469 U.S. at 293. The Court then summarized a "two-pronged holding" in *Guardians*:

> First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions ~~having~~ an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.

Id. (footnotes omitted). Again, in *Alexander*, the Court did not state that private individuals could enforce agency regulations.[2] Not only did the Court not say that in *Alexander*, it has not said it since.

Indeed, in *United States v. Fordice*, 505 U.S. 717 (1992), this Court rejected an attempt by private petitioners to assert a claim regarding affirmative action required by Title VI regulations. The Court stated:

> Private petitioners reiterate in this court their assertion that the state system also violates Title VI citing a regulation to that statute that requires States to "overcome the effects of prior discrimination." 34 C.F.R. § 100.3(b)(6)(i) (1991). Our cases make clear, and the parties do not

---

[2] To the extent that the Court considered issues raised by a private litigant in *Alexander*, any approval is tacit. Such tacit approval also relates only to lawsuits brought under the Rehabilitation Act, 29 U.S.C. § 794. The private litigant in *Alexander* proceeded under the Rehabilitation Act, not Title VI.

> disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. [Citing *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and *Guardians*]. We thus treat these issues as they are implicated under the Constitution.

Id. at 732 n.7. Respondent suggests that this footnote "does not signal a retreat from the conclusion that private parties may enforce agency regulations," Br. in Opp. at 18, but the effect of the footnote is to preclude those private parties from enforcing the cited regulation. If this Court had previously recognized an implied private right of action to enforce agency disparate impact regulations, there would have been no need for the footnote.

Measured against the background of this Court's opinions, the decisions of the courts of appeals are not persuasive. Again, only two circuits have explained how they reach the conclusion that there is an implied private right of action under Section 602. The rest simply assert or assume that it exists. The Eleventh Circuit relied on its own understanding of this Court's opinions, *see* App. at 42a-48a, and the Third Circuit relied on its precedent regarding the enforceability of regulations.[3] *See Powell v. Ridge*, 189 F.3d 387, 397-400 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999).[4] Neither court looked at the intent of Congress, which is the fundamental question. *See Middlesex County Sewerage Auth. v. National Sea Clammers*

[3] The question whether the regulations are valid is fairly embraced in the question whether private litigants may enforce them.

[4] Unlike this case, which comes to this Court after a full trial, *Powell v. Ridge* came on a ruling on motion to dismiss.

Assn., 453 U.S. 1, 13 (1981). This Court should grant the Petition and examine this fundamental question.

2. Respondent contends that this case is not ripe for review because it is interlocutory and there is an unresolved § 1983 claim. Br. in Opp. 6-11. Respondent is mistaken because Petitioners appealed from a judgment and permanent injunction after a trial on the merits. That permanent injunction prohibited Petitioners from continuing to test only in English and directed Petitioners to take affirmative steps to accommodate "Alabama's non-English speaking residents who seek Alabama driver's licenses." App. at 253a. When the District Court stayed the injunction, it "DIRECTED [the parties] to abide by the terms of their agreement as set forth in their July 9, 1998, Joint Motion." That agreement calls for the Department of Public Safety to test in seven foreign languages: Spanish, German, Korean, Japanese, French, Mandarin Chinese, and Vietnamese. Supp. App. at 5a. Respondent contends that this is not enough: Petitioners must not only expand the number of languages, they must also make "some provision beyond use of mere translation dictionaries . . . for non-English speaking applicants whose languages are not available in the written exam." Supp. App. at 8a-9a. Petitioners will clearly be required to take affirmative action to remedy the regulatory violation found by the District Court. This case should not be considered interlocutory when only some of the details of the imposed relief remain undefined.

The presence of an unresolved § 1983 claim does not preclude certiorari either. The District Court reserved ruling on the § 1983 claim after a trial on the merits at the conclusion of which it "granted the Defendants' motion

for judgment as a matter of law on Plaintiffs' intentional discrimination claims." App. at 64a n.4. As the Eleventh Circuit notes, that claim is unresolved because Respondent wanted it that way: "In this case, plaintiffs relied on Section 602 directly rather than basing their cause of action on Section 1983." App. at 45a n.21. Respondent should not now be heard to leverage her choice into a procedural barrier. Moreover, Respondent's present construction of her § 1983 claim does not match the claim that she pled. As pled, her § 1983 claim, which was made under the Fourteenth Amendment, requires a showing of intentional discrimination, not disparate impact like the regulatory claim that the District Court ruled on. *See, e.g., Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 238-39 (1976). While § 1983 provides Respondent with a vehicle for vindicating her Fourteenth Amendment rights, it is doubtful that it provides the basis for a private right of action to enforce Section 602 regulations. *See Middlesex Sea Clammers*, 453 U.S. at 13-15. In any event, this case is no different from any other in which a District Court rules in one party's favor on one ground without ruling on each and every claim and defense. The ruling on that ground can be reviewed on appeal, and the case remanded if necessary.

Respondent's suggestion that she can prevail as a third-party beneficiary lacks merit. If Congress did not intend to create a private right of action that would permit Respondent to enforce the regulations directly, it is very unlikely that it intended to allow her to proceed indirectly. *See Suter v. Artist M.*, 503 U.S. 347, 363 (1992). Moreover, the grants that form the basis for liability do

not convey any direct benefit to Respondent. None of the grants funded the testing of driver's license applicants. Conversely, the direct, and presumably intended, beneficiaries of grants to fund trooper overtime for speed limit or DUI enforcement are the members of the driving and road-using public, not applicants for driver's licenses. Absent a directly-conveyed benefit, Respondent lacks the interest necessary to give her either standing or third-party beneficiary status. *See Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *Suter v. Artist M.*, 503 U.S. at 363.

3. Respondent is incorrect in her contention that how the disparate impact regulations will be applied in this case is irrelevant. Br. in Opp. 24-27. The uses to which the implied private right of action can be put are fairly embraced in the fundamental question of Congressional intent. The statutory language of Section 602 imposes notice and timing limits on agency enforcement actions. Private actions are subject to no such limitations. Did the same Congress that imposed those limits on agency actions intend that private litigants would be able to require state agencies to give driver's license examinations in foreign languages? Did that Congress intend that private litigants could attack the siting of state highways or wastewater treatment facilities? *See Bryant v. New Jersey Dept. of Transportation*, 987 F. Supp. 343 (D.N.J. 1998), *vacated in part*, 998 F. Supp. 438 (D.N.J. 1998); *Chester Residents*, respectively. Those are, however, some of the ways in which an implied private right of action is being used.

The question presented also fairly includes the question whether, as a matter of contract interpretation, the grants can be read to require Petitioners to provide

remedies that include testing in foreign languages. Such an obligation must be clearly spelled out in the contract, *see, e.g., Blessing*, 520 U.S. at 341, and ambiguities are to be construed against the drafter. *See, e.g., United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806). Neither a general disparate impact regulation nor a Department of Justice regulation that applies when "a *significant* number or proportion of the population eligible to be served or likely to be *directly affected* by a federally assisted program . . . needs service or information in a language other than English," *see* 28 C.F.R. § 42.405(d)(1) (1976) (emphasis added), provides the necessary notice. Alternatively, if a grantor agency believes that it does, the agency should enforce its interpretation in compliance with the procedures that Congress specified.

For the reasons stated above and in the Petition, this Court should grant the petition for writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
vs.	)	**Case No. CV-96-D-1875-N**
L.N. HAGAN, et al.,	)	
Defendants.	)	

JOINT MOTION FOR ENTRY OF STAY

Martha Sandoval, individually and as representative of all others similarly situated, plaintiff in this action, and L. N. Hagan, in his official capacity as Director of the Alabama Department of Public Safety, and the Department of Public Safety, defendants in this action, jointly request this Court to enter a stay of its injunction pending Hagan's and the Department's appeal. The joint request is made pursuant to the terms of the letter attached hereto.

WHEREFORE, this Court should stay its injunction pending appeal.

Respectfully submitted,

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/s/ John J. Park, Jr.
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Re: *Sandoval v. Hagan, et al.*

Dear Richard:

Pursuant to our conversations, I write to set forth the basis on which the parties have agreed to the District Court's entry of a stay. More specifically, you have agreed to the entry of a stay in exchange for the Department's implementation of a plan for testing in languages other than English or otherwise accommodating applicants who are not able to read or write English. As you understand, the Department's implementation of the program would not be "voluntary." The District Court has directed the Department to implement a program, the Department plans to appeal, and it is not ceasing the English-only testing program voluntarily.

Nonetheless, on an interim basis, the Department is willing to implement a program of testing in languages other than English as set forth below:

1. The Department will procure translations of the examination(s) in the following languages: Spanish, German, Korean, Japanese, French, Mandarin Chinese, and Vietnamese. The Spanish language examination will be available at all examination stations within sixty (60) days after the District Court's entry of a stay, and the German, Korean, Japanese, French, Mandarin Chinese, and Vietnamese language examination will be available at the district headquarters offices within 120 days after entry of a stay. At present, there are seven (7) such district headquarters offices, but the number may be reduced to five (5) due to budget limitations. Any reductions in the number of district headquarters offices will affect not only driver's license activities but also highway patrol and ABI and will not be made with the intent to discriminate on an invidious basis because English speakers will suffer too.

2. An applicant who wishes to take the examination in German, Korean, Japanese, French, Mandarin Chinese, or Vietnamese may call the district headquarters office one week in advance to request that an appropriate foreign-language translation be taken to an examination station. Such applicant will have to identify the examination station, the date of the examination, and the language involved. Absent such advance notice, the applicant can take the foreign-language examination at the district headquarters office.

3. Applicants who desire to be tested in any other language will be offered the opportunity to use a translation dictionary subject to the stipulation that the Examiner shall be entitled to inspect and approve the dictionary before use.

4. The Department shall continue to administer the road skills tests as it has done to date. To assist persons who are not proficient in English, the Department will continue to have its examiners take such steps as using hand signals, using the flash cards developed to assist hearing-impaired applicants, and explaining to the applicant, through the applicant's interpreter as described in paragraph 5, the nature of the test (*e.g.*, what the applicant may be asked to do and the types of commands the examiner may use during the test).

5. Applicants who do not speak English will be entitled to the assistance of an interpreter for administrative purposes. The interpreter may assist in the application process and may help give administrative instructions to the applicant. The assistance of an interpreter will not be permitted on the written examination or the road skills tests other than with respect to administrative instruction.

6. The Department and Hagan shall be entitled to proceed with their appeal.

7. This interim procedure shall last until the stay is lifted. It shall not be subject to the oversight of the District Court, the Southern Poverty Law Center, or anyone else.

8. The Department reserves the right to modify this interim program, but shall have no obligation to do so. As

a courtesy, the Department will notify plaintiffs' counsel of any modifications to the interim program. If the plaintiffs believe that the modification undermines the interim program, plaintiffs may petition the Court for relief.

9. The Department's and Hagan's implementation of this interim program are expressly understood not to be voluntary. Plaintiffs further acknowledge that the possibility that the Department will resume its practice of testing only in English if the Department prevails on appeal is reasonably to be expected.

10. If and when the stay is lifted, plaintiffs reserve the right to claim that a program such as the Department's interim program does not comply with the Court's Order. Hagan and the Department likewise reserve any right they may have with respect to remedy.

Please let me know if this proposal is acceptable to you. If so, you or Rhonda could sign below, and we could then submit the fully signed letter to the court with a Joint Motion for Entry of Stay.

Very truly yours,

/s/ John J. Park, Jr.
John J. Park, Jr.
Assistant Attorney General

cc: Robert E. Morrow, Esq.

JJPjr/pc

AGREED TO
BY:

/s/ J. Richard Cohen
One of the Attorneys for
Martha Sandoval

SPLC [LOGO]

SOUTHERN POVERTY LAW CENTER

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Militia Task Force

[Address Omitted In Printing]

May 2, 2000

Via Fax and Regular Mail

John J. Park, Esq.
Office of the Attorney General
11 South Union Street
Montgomery, AL 36104

Re: *Sandoval v. Hagan*

Dear Jack:

Judge DeMent's order directs us to meet and confer to resolve attorneys' fee issues and "all other remaining issues in this case" by May 10, and to file a joint pleading on the matters by May 15. By referring to "all other remaining issues," we assume Judge DeMent means the remedy to be issued in the case. If the State intends to file a petition for certiorari review and you want a stay of Judge DeMent's order, we won't oppose your motion. Just let us know as soon as possible.

In the meantime, we are drafting a proposal for fees and intend to get it to you by May 5. Regarding the relief to be issued, Judge DeMent's original decision ordered that "the Defendants shall, in conjunction with the Plaintiffs, fashion proposed policies and practices for the

accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses." The Judge's order that the State make the initial proposal is, of course, consistent with principles of federalism. We'd like to get your proposal by May 5, if possible.

When drafting proposed policies and procedures, we'd like you to consider a few points. First, although the seven foreign languages in which the test is currently available may have seemed adequate when you drafted the interim testing program, the fact that the State previously utilized twice the number of foreign languages probably demonstrates that an expanded number of languages is both practical and necessary. Second, we believe that it's important that some provision beyond use of mere translation dictionaries be made for non-English speaking applicants whose languages are not available in the written exam. As the trial testimony demonstrated, translation dictionaries are practically useless for translation of the written exam, and the State's fear that interpreters will help applicants to cheat is unfounded.

We'd like to meet to discuss these matters by May 8 or 9, after we've reviewed each other's proposals. Please get back to me or Richard as soon as possible.

Thanks.

Sincerely yours,

/s/ Rhonda
Rhonda Brownstein

Supreme Court, U.S.
FILED
SEP 18 2000
CLERK

No. 99-1908

In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILL PRYOR
Attorney General of Alabama

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Executive Order 13166, 65 Fed. Reg. 50121 (Aug. 16, 2000) ..... *passim*

SUPPLEMENTAL BRIEF

1. Petitioners James Alexander, in his official capacity as Director of the Alabama Department of Public Safety, and the Alabama Department of Public Safety (the "Department") submit this Supplemental Brief in support of their Petition for Writ of Certiorari for the purpose of bringing to this Court's attention new matter not in existence at the time Petitioners filed their Reply Brief. Specifically, after Petitioners filed their Reply Brief on August 9, 2000, President Clinton issued Executive Order 13166 on August 11, 2000. *See* Supp. App. at 10a-13a. In addition, on August 16, 2000, the Department of Justice ("DOJ") published Policy Guidance entitled "Enforcement of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons with Limited English Proficiency" in the Federal Register which is based on the opinion of the Court of Appeals in this case.[1] *See* Supp. App. at 14a-28a. These new matters relate directly to the issues raised in the Petition and make it even more timely as well as fitting for this Court to review the Eleventh Circuit's decision.

2. The President's Executive Order and DOJ's Policy Guidance highlight both the timeliness and certworthiness of this case. In Section 602 of the Civil Rights Act of 1964, Congress expressly made the federal agencies responsible for ensuring that their grantees followed agency regulations and provided those agencies with an enforcement mechanism. If an effective method for

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[1] The Department of Justice Policy Guidance is effective August 11, 2000. Supp. App. at 14a.

agency policing of grantees is in place, there is no need for the judiciary to find an implied private right of action in Section 602. Executive Order 13166 and the DOJ Policy Guidance provide just such a mechanism directing the federal agencies to promulgate guidelines on dealing with persons with limited proficiency in English. While Petitioners believe that the Policy Guidance is flawed, that problem is only compounded exponentially by the Court of Appeals' decision to allow a private litigant to do what Congress authorized the federal agencies to do 25 years ago and what the President and DOJ are now telling them to do. If the Court of Appeals' decision in this case stands, the DOJ Policy Guidance will produce a flood of lawsuits against federal grantees.

3. This case arises under Title VI of the Civil Rights Act of 1964 and its implementing regulations. Respondent contends that the Alabama Department of Public Safety's practice of giving the written examinations for driver's licenses in only the English language has the effect of discriminating on the basis of national origin. The Court of Appeals held that Respondent, a private individual, can sue the Department, a federal grantee, to enforce agency regulations. In addition, the Court of Appeals held that language could be equated to national origin, thereby providing the basis for the federal courts' directive to the Department to change its English-only policy.

Executive Order 13166 and the DOJ Policy Guidance bear directly on the relief ordered in this case and, through that relief, on the importance of the claimed private right of action. In Executive Order 13166, President Clinton directs federal agencies to "work to ensure

that recipients of federal financial assistance (recipients) provide meaningful access to their [Limited English Proficient] applicants and beneficiaries." Supp. App. at 11a (parenthesis in original; brackets added). President Clinton then interlocks Executive Order 13166 with the DOJ Policy Guidance, stating:

> To assist the agencies . . . , the Department of Justice has today issued a general guidance document (LEP Guidance), which sets forth the compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964, as amended, and its implementing regulations.

Supp. App. at 11a (parenthesis in original). Finally, President Clinton states:

> This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.

Supp. App. at 13a.

In the DOJ Policy Guidance, which is in the form of a Memorandum from Bill Lann Lee, Assistant Attorney General, Civil Rights Division to Executive Agency Civil Rights Officers, DOJ advises the agencies that "Title VI and its regulations require recipients to take reasonable steps to ensure 'meaningful' access to the information and services they provide." Supp. App. at 23a. Grantees

will have to take some *affirmative* step[2] in favor of each person with limited English proficiency ("LEP person") because DOJ states, "Recipients who fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title VI and its implementing regulations." *Id.* DOJ states that what steps are reasonable depends in part on the "number or proportion of LEP persons in the eligible service population." *Id.* DOJ then explains:

> The steps that are reasonable for a recipient who serves one LEP person a year may be different than those expected from a recipient that serves several LEP persons each day. But even those who serve very few LEP persons on an infrequent basis should utilize this balancing analysis to determine whether reasonable steps are possible. . . .

Supp. App. at 23a-24a. Finally, DOJ states, "It is the responsibility of federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments by applying their program expertise to concrete cases." Supp. App. at 27a.

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[2] DOJ states that recipients who serve "very few LEP persons on an infrequent basis" should have a "plan," adding that the "plan need not be intricate; it may be as simple as being prepared to use one of the commercially available language lines to obtain immediate interpreter service." Supp. App. at 24a; *see also* Supp. App. at 26a, n.13 carryover ("[I]n situations where all of the factors identified in the text are at their nadir, it may be 'reasonable' to take no affirmative steps to provide further access.") Thus, grantees will have to bear the expense of using "one of the commercially available language lines."

4. In their Petition, Alexander and the Department raise the question whether Congress intended to create a private right of action against a State agency that receives federal grant funds. If such a private right of action exists, private individuals can sue grantees directly to enforce agency regulations, thereby bypassing the agency review and enforcement procedures that Congress established and which the President and DOJ have recently addressed.

Executive Order 13166 and the DOJ Policy Guidance illustrate how Congress intended Title VI to be enforced. These directives also show that the federal agencies will be dealing with the underlying issue in this case, thereby calling into question the need for a private right of action. Executive Order 13166 directs federal agencies to "draft title VI guidance specifically tailored to its recipients that is consistent with the LEP Guidance issued by the Department of Justice. This agency-specific guidance shall detail how the general standards established in the LEP Guidance will be applied to the agency's recipients." Supp. App. at 12a. The DOJ Policy Guidance declares, "It is the responsibility of federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments [than the general guidance] by applying their program expertise to concrete cases." Supp. App. at 27a. When the agencies have complied with these instructions, they will have a basis for any necessary enforcement activity and can then report to Congress as Section 602 requires.

In this case, conversely, no federal grantor agency has initiated enforcement action against the Department

because of its English-only testing policy, much less provided notice to Congress. Thus, while the Administration is telling federal agencies to prepare the basis for compliance with Section 602, the Court of Appeals has allowed a private individual to tell the Department, a State agency, what to do.

Further, the forthcoming agency-level policy guidance portends only more language-related litigation against Title VI grantees unless certiorari is granted and the Court of Appeals' decision is reversed. DOJ's Policy Guidance sets forth imprecise criteria that may cover as few as one person of limited English proficiency who speaks one of any of the languages spoken on Earth.[3] It states:

> What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered are the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come into contact with the program, the importance of the service provided by the program and the resources available to the recipient.

Supp. App. at 23a. The result is a "balancing analysis" that must be employed for every LEP person because

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[3] DOJ states that its Policy Guidance "does not create new obligations, but rather, clarifies existing Title VI responsibilities." Supp. App. at 14a, 15a-16a. Alexander and the Department disagree because the Policy Guidance directs agencies to impose an affirmative obligation of accommodation that is greater than the congressionally mandated Title VI obligation to refrain from intentional discrimination.

"[p]rograms that serve a few or even one LEP person are still subject to the Title VI obligation to take reasonable steps to provide meaningful opportunities for access." *Id.* In the eye of the Policy Guidance, every language must be accommodated because there is no principled basis for selecting some languages but not others. There is also no way for a grantee to predict what steps will be found by a court after the fact to be "reasonable" and to make for a "meaningful opportunit[y]." *Cf. Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) ("There can be no knowing acceptance if a State is . . . unable to ascertain what is expected of it.").

The Policy Guidance is promulgated in an attempt to stamp out discrimination on the basis of national origin, but this Court has concluded that national origin is one's country of origin or the country of origin of one's ancestors. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-89 (1973). In addition, because the Policy Guidance rests on a broad interpretation of this Court's ruling in *Lau v. Nichols*, 414 U.S. 563 (1974), it highlights the need to cabin *Lau*. *See* Pet. at 17; Brief of U.S. English as Amicus Curiae in Support of Petition for Writ of Certiorari at 11-13, *Alexander v. Sandoval* (No. 99-1908). While the Policy Guidance applies to programs that serve "a few or even one LEP person," Justice Blackmun, joined by Chief Justice Burger, warned against interpreting *Lau* "too broadly." *Lau*, 414 U.S. at 572 (Blackmun, J., joined by Burger, C. J., concurring in the result). He explained:

> I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children

> cannot understand the language of the classroom. . . . [W]hen, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish, or any other language other than English, I would not regard today's decision, or the separate concurrence as conclusive. . . .

Id. If, as the Policy Guidance provides, the size of a foreign-language speaking population is irrelevant, the limitation Justices Blackmun and Chief Justice Burger had in mind for obligations and lawsuits is likewise to be discarded.[4]

Instead of limiting *Lau*, the Policy Guidance expands its reach, relying in part on the Court of Appeals' decision in this case. Specifically, the Policy Guidance states:

> Courts have applied the doctrine enunciated in *Lau* both inside and outside the education context. It has been considered in contexts as varied as what languages drivers' license tests must be given in or whether material relating to unemployment benefits must be given in a language other than English.

Supp. App. at 19a (citing the decision below as an example of "cases outside the educational context"). This expansion of *Lau's* scope contrasts with the view of Congress, which codified *Lau* in the education context, *see* 20

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[4] Insofar as the Policy Guidance shifts the burden of justification to grantees, it conflicts with the Ninth Circuit's decision in *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) (rejecting EEOC's "English-only rule Guidelines," 29 C.F.R. 1606.7(a) (1991) as beyond the agency's authority).

U.S.C. § 1703(f), and has imposed an obligation to speak in foreign languages in only one other context, voting, *see, e.g.*, 42 U.S.C. § 1973aa-1a (bilingual ballots). Moreover, this expansion threatens to ripple through to Title VII because that Title also proscribes discrimination on the basis of "national origin."

In sum, the combination of a private right of action and overbroad federal regulations promise a flood of litigation against federal grantees. Private litigants will use the courts to tell grantees to do something that neither the Constitution nor federal statutes mandate. Furthermore, a private right of action bypasses the agency enforcement mechanism that Congress expressly established. At one level, Executive Order 13166 and the DOJ Policy Guidance finally tell the agencies to provide guidance to their grantees in a way that might allow for agency enforcement in accordance with Section 602. If a private right of action is enshrined in law, however, the Policy Guidance provides only a basis for lawsuits, with the concomitant risk that the judiciary will expand Title VI outside the congressionally established framework.

In the view of Alexander and the Department, the Petition raised a fundamental question of federal law worthy of consideration by this Court. Executive Order

13166 and the DOJ Policy Guidance make such consideration all the more imperative.

Respectfully submitted,

BILL PRYOR
Attorney General of Alabama

JOHN J. PARK, JR.
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Counsel for Petitioners

Federal Register **Presidential Documents**

Vol. 65, No. 159

Wednesday, August 16, 2000

Title 3 –

Executive Order 13166 of August 11, 2000

The President

Improving Access to Services for Persons With Limited English Proficiency

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency (LEP), it is hereby ordered as follows:

Section 1. *Goals.*

The Federal Government provides and funds an array of services that can be made accessible to otherwise eligible persons who are not proficient in the English language. The Federal Government is committed to improving the accessibility of these services to eligible LEP persons, a goal that reinforces its equally important commitment to promoting programs and activities designed to help individuals learn English. To this end, each Federal agency shall examine the services it provides and develop and implement a system by which LEP persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental

mission of the agency. Each Federal agency shall also work to ensure that recipients of Federal financial assistance (recipients) provide meaningful access to their LEP applicants and beneficiaries. To assist the agencies with this endeavor, the Department of Justice has today issued a general guidance document (LEP Guidance), which sets forth the compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964, as amended, and its implementing regulations. As described in the LEP Guidance, recipients must take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.

Sec. 2. *Federally Conducted Programs and Activities.*

Each Federal agency shall prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons. Each plan shall be consistent with the standards set forth in the LEP Guidance, and shall include the steps the agency will take to ensure that eligible LEP persons can meaningfully access the agency's programs and activities. Agencies shall develop and begin to implement these plans within 120 days of the date of this order, and shall send copies of their plans to the Department of Justice, which shall serve as the central repository of the agencies' plans.

Sec. 3. *Federally Assisted Programs and Activities.*

Each agency providing Federal financial assistance shall draft title VI guidance specifically tailored to its recipients that is consistent with the LEP Guidance issued by the Department of Justice. This agency-specific guidance shall detail how the general standards established in the LEP Guidance will be applied to the agency's recipients. The agency-specific guidance shall take into account the types of services provided by the recipients, the individuals served by the recipients, and other factors set out in the LEP Guidance. Agencies that already have developed title VI guidance that the Department of Justice determines is consistent with the LEP Guidance shall examine their existing guidance, as well as their programs and activities, to determine if additional guidance is necessary to comply with this order. The Department of Justice shall consult with the agencies in creating their guidance and, within 120 days of the date of this order, each agency shall submit its specific guidance to the Department of Justice for review and approval. Following approval by the Department of Justice, each agency shall publish its guidance document in the **Federal Register** for public comment.

Sec. 4. *Consultations.*

In carrying out this order, agencies shall ensure that stakeholders, such as LEP persons and their representative organizations, recipients, and other appropriate individuals or entities, have an adequate opportunity to provide input. Agencies will evaluate the particular needs of the LEP persons they and their recipients serve

and the burdens of compliance on the agency and its recipients. This input from stakeholders will assist the agencies in developing an approach to ensuring meaningful access by LEP persons that is practical and effective, fiscally responsible, responsive to the particular circumstances of each agency, and can be readily implemented.

Sec. 5. *Judicial Review.*

This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.

/s/ William J. Clinton

THE WHITE HOUSE,
August 11, 2000.

Federal Register/Vol. 65, No. 159/Wednesday, August 16, 2000/Notices

DEPARTMENT OF JUSTICE

Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance

AGENCY: Civil Rights Division, Department of Justice.

ACTION: Policy guidance document.

SUMMARY: This Policy Guidance Document entitled "Enforcement of Title VI of the Civil Rights Act of 1964 "National Origin Discrimination Against Persons with Limited English Proficiency (LEP Guidance)" is being issued pursuant to authority granted by Executive Order 12250 and Department of Justice Regulations. It addresses the application of Title VI's prohibition on national origin discrimination when information is provided only in English to persons with limited English proficiency. This policy guidance does not create new obligations, but rather, clarifies existing Title VI responsibilities. The purpose of this document is to set forth general principles for agencies to apply in developing guidelines for services to individuals with limited English proficiency. The Policy Guidance Document appears below.

DATES: Effective August 11, 2000.

ADDRESSES: Coordination and Review Section, Civil Rights Division, P.O. Box 66560, Washington, D.C. 20035-6560.

FOR FURTHER INFORMATION CONTACT: Merrily Friedlander, Chief, Coordination and Review Section, Civil Rights Division, (202) 307-2222.

Helen L. Norton,
Counsel to the Assistant Attorney General, Civil Rights Division.

Office of the Assistant Attorney General

Washington, D.C. 20530

August 11, 2000.

TO: Executive Agency Civil Rights Officers

FROM: Bill Lann Lee, Assistant Attorney General, Civil Rights Division

SUBJECT: Policy Guidance Document: *Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons With Limited English Proficiency* ("LEP Guidance")

This policy directive concerning the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq., as amended,* is being issued pursuant to the authority granted by Executive Order No. 12250[1] and Department of Justice regulations.[2] It addresses the application to recipients of federal financial assistance of Title VI's prohibition on national origin discrimination when information is provided only in English to persons who do not understand English. This policy guidance does not create

[1] 42 U.S.C. § 2000d-1 note.

[2] 28 C.F.R. § 0.51.

new obligations but, rather, clarifies existing Title VI responsibilities.

Department of Justice Regulations for the Coordination of Enforcement of Non-discrimination in Federally Assisted Programs (Coordination Regulations), 28 C.F.R. 42.401 *et seq.*, direct agencies to "publish title VI guidelines for each type of program to which they extend financial assistance, where such guidelines would be appropriate to provide detailed information on the requirements of Title VI." 28 CFR § 42.404(a). The purpose of this document is to set forth general principles for agencies to apply in developing such guidelines for services to individuals with limited English proficiency (LEP). It is expected that, in developing this guidance for their federally assisted programs, agencies will apply these general principles, taking into account the unique nature of the programs to which they provide federal financial assistance.

A federal aid recipient's failure to assure that people who are not proficient in English can effectively participate in and benefit from programs and activities may constitute national origin discrimination prohibited by Title VI. In order to assist agencies that grant federal financial assistance in ensuring that recipients of federal financial assistance are complying with their responsibilities, this policy directive addresses the appropriate compliance standards. Agencies should utilize the standards set forth in this Policy Guidance Document to develop specific criteria applicable to review the programs and activities for which they offer financial

assistance. The Department of Education[3] already has established policies, and the Department of Health and Human Services (HHS)[4] has been developing guidance in a manner consistent with Title VI and this Document, that applies to their specific programs receiving federal financial assistance.

Background

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating against or otherwise excluding individuals on the basis of race, color, or national origin in any of their activities. Section 601 of Title VI, 42 U.S.C. § 2000d, provides:

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[3] Department of Education policies regarding the Title VI responsibilities of public school districts with respect to LEP children and their parents are reflected in three Office for Civil Rights policy documents: (1) the May 1970 memorandum to school districts, "Identification of Discrimination and Denial of Services on the Basis of National Origin," (2) the December 3, 1985, guidance document, "The Office for Civil Rights' Title VI Language Minority Compliance Procedures," and (3) the September 1991 memorandum, "Policy Update on Schools Obligations Toward National Origin Minority Students with Limited English Proficiency." These documents can be found at the Department of Education website at www.ed.gov/office/OCR.

[4] The Department of Health and Human Services is issuing policy guidance titled: "Title VI Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency." This policy addresses the Title VI responsibilities of HHS recipients to individuals with limited English proficiency.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The term "program or activity" is broadly defined. 42 U.S.C. § 2000d-4a.

Consistent with the model Title VI regulations drafted by a Presidential task force in 1964, virtually every executive agency that grants federal financial assistance has promulgated regulations to implement Title VI. These regulations prohibit recipients from "restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program" and "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."

In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court interpreted these provisions as requiring that a federal financial recipient take steps to ensure that language barriers did not exclude LEP persons from effective participation in its benefits and services. *Lau* involved a group of students of Chinese origin who did not speak English to whom the recipient provided the same services – an education provided solely in English – that it provided students who did speak English. The Court held that, under these circumstances, the school's

practice violated the Title VI prohibition against discrimination on the basis of national origin. The Court observed that "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program – all earmarks of the discrimination banned by" the Title VI regulations.[5] Courts have applied the doctrine enunciated in *Lau* both inside and outside the education context. It has been considered in contexts as varied as what languages drivers' license tests must be given in or whether material relating to unemployment benefits must be given in a language other than English.[6]

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[5] 414 U.S. at 568. Congress manifested its approval of the *Lau* decision requirements concerning the provision of meaningful education services by enacting provisions in the Education Amendments of 1974, Pub. L. No. 93-380, §§ 105, 204, 88 Stat. 503-512, 515 codified at 20 U.S.C. 1703(f), and the Bilingual Education Act, 20 U.S.C. 7401 *et seq.*, which provided federal financial assistance to school districts in providing language services.

[6] For cases outside the educational context, *see, e.g., Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998), *affirmed*, 197 F.3d 484, (11th Cir. 1999), *rehearing and suggestion for rehearing en banc denied*, 211 F.3d 133 (11th Cir. Feb. 29, 2000) (Table, No. 98-6598-II), *petition for certiorari filed* May 30, 2000 (No. 99-1908) (giving drivers' license tests only in English violates Title VI); and *Pabon v. Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976) (summary judgment for defendants denied in case alleging failure to provide unemployment insurance information in Spanish violated Title VI).

Link Between National Origin And Language

For the majority of people living in the United States, English is their native language or they have acquired proficiency in English. They are able to participate fully in federally assisted programs and activities even if written and oral communications are exclusively in the English language.

The same cannot be said for the remaining minority who have limited English proficiency. This group includes persons born in other countries, some children of immigrants born in the United States, and other non-English or limited English proficient persons born in the United States, including some Native Americans. Despite efforts to learn and master English, their English language proficiency may be limited for some time.[7] Unless grant recipients take steps to respond to this difficulty, recipients effectively may deny those who do not speak, read, or understand English access to the benefits and services for which they qualify.

Many recipients of federal financial assistance recognize that the failure to provide language assistance to such persons may deny them vital access to services and benefits. In some instances, a recipient's failure to remove language barriers is attributable to ignorance of the fact

---

[7] Certainly it is important to achieve English language proficiency in order to fully participate at every level in American society. As we understand the Supreme Court's interpretation of Title VI's prohibition of national origin discrimination, it does not in any way disparage use of the English language.

that some members of the community are unable to communicate in English, to a general resistance to change, or to a lack of awareness of the obligation to address this obstacle.

In some cases, however, the failure to address language barriers may not be simply an oversight, but rather may be attributable, at least in part, to invidious discrimination on the basis of national origin and race. While there is not always a direct relationship between an individual's language and national origin, often language does serve as an identifier of national origin.[8] The same sort of prejudice and xenophobia that may be at the root of discrimination against persons from other nations may be triggered when a person speaks a language other than English.

> Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility * * * . It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.[9]

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[8] As the Supreme Court observed, "[l]anguage permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond." *Hernandez v. New York*, 500 U.S. 352, 370 (1991) (plurality opinion).

[9] *Id.* at 371 (plurality opinion).

While Title VI itself prohibits only intentional discrimination on the basis of national origin,[10] the Supreme Court has consistently upheld agency regulations prohibiting unjustified discriminatory effects.[11] The Department of Justice has consistently adhered to the view that the significant discriminatory effects that the failure to provide language assistance has on the basis of national origin, places the treatment of LEP individuals comfortably within the ambit of Title VI and agencies' implementing regulations.[12] Also, existing language barriers potentially may be rooted in invidious discrimination. The Supreme Court in *Lau* concluded that a recipient's failure to take affirmative steps to provide "meaningful opportunity" for LEP individuals to participate in its

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[10] *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

[11] *Id.* at 293-294; *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2 (1983) (White, J.), 623 n.15 (Marshall, J.), 642-645 (Stevens, Brennan, Blackmun, JJ.); *Lau v. Nichols*, 414 U.S. at 568; *id.* at 571 (Stewart, J., concurring in result). In a July 24, 1994, memorandum to Heads of Departments and Agencies that Provide Federal Financial Assistance concerning "Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964," the Attorney General stated that each agency "should ensure that the disparate impact provisions of your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs."

[12] The Department's position with regard to written language assistance is articulated in 28 CFR § 42.405(d)(1), which is contained in the Coordination Regulations, 28 CFR Subpt. F, issued in 1976. These Regulations "govern the respective obligations of Federal agencies regarding enforcement of title VI." 28 CFR § 42.405. Section 42.405(d)(1) addresses the prohibitions cited by the Supreme Court in *Lau*.

programs and activities violates the recipient's obligations under Title VI and its regulations.

All Recipients Must Take Reasonable Steps To Provide Meaningful Access

Recipients who fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title VI and its implementing regulations. Title VI and its regulations require recipients to take reasonable steps to ensure "meaningful" access to the information and services they provide. What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered are the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient.

(1) Number or Proportion of LEP Individuals

Programs that serve a few or even one LEP person are still subject to the Title VI obligation to take reasonable steps to provide meaningful opportunities for access. However, a factor in determining the reasonableness of a recipient's efforts is the number or proportion of people who will be excluded from the benefits or services absent efforts to remove language barriers. The steps that are reasonable for a recipient who serves one LEP person a-

year may be different than those expected from a recipient that serves several LEP persons each day. But even those who serve very few LEP persons on an infrequent basis should utilize this balancing analysis to determine whether reasonable steps are possible and if so, have a plan of what to do if a LEP individual seeks service under the program in question. This plan need not be intricate; it may be as simple as being prepared to use one of the commercially available language lines to obtain immediate interpreter services.

(2) Frequency of Contact with the Program

Frequency of contacts between the program or activity and LEP individuals is another factor to be weighed. For example, if LEP individuals must access the recipient's program or activity on a daily basis, e.g., as they must in attending elementary or secondary school, a recipient has greater duties than if such contact is unpredictable or infrequent. Recipients should take into account local or regional conditions when determining frequency of contact with the program, and should have the flexibility to tailor their services to those needs.

(3) Nature and Importance of the Program

The importance of the recipient's program to beneficiaries will affect the determination of what reasonable steps are required. More affirmative steps must be taken in programs where the denial or delay of access may have life or death implications than in programs that are not as crucial to one's day-to-day existence. For example, the obligations of a federally assisted school or hospital differ

from those of a federally assisted zoo or theater. In assessing the effect on individuals of failure to provide language services, recipients must consider the importance of the benefit to individuals both immediately and in the long-term. A decision by a federal, state, or local entity to make an activity compulsory, such as elementary and secondary school attendance or medical inoculations, serves as strong evidence of the program's importance.

(4) Resources Available

The resources available to a recipient of federal assistance may have an impact on the nature of the steps that recipients must take. For example, a small recipient with limited resources may not have to take the same steps as a larger recipient to provide LEP assistance in programs that have a limited number of eligible LEP individuals, where contact is infrequent, where the total cost of providing language services is relatively high, and/or where the program is not crucial to an individual's day-to-day existence. Claims of limited resources from large entities will need to be well-substantiated.[13]

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[13] Title VI does not require recipients to remove language barriers when English is an essential aspect of the program (such as providing civil service examinations in English when the job requires person to communicate in English, *see Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975)), or there is another "substantial legitimate justification for the challenged practice." *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993). Similar balancing tests are used in other nondiscrimination provisions that are concerned with effects of an entity's actions. For example, under Title VII of the Civil Rights Act of 1964, employers need not cease practices that have a discriminatory effect if they are "consistent with business necessity" and there is no "alternative employment practice" that is equally effective. 42 U.S.C. § 2000e-2(k). Under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, recipients do not need to provide access to persons with disabilities if such steps impose an undue burden on the recipient. *Alexander v. Choate*, 469 U.S. at 300. Thus, in situations where all of the factors identified in the text are at their nadir, it may be "reasonable" to take no affirmative steps to provide further access.

Written vs. Oral Language Services

In balancing the factors discussed above to determine what reasonable steps must be taken by recipients to provide meaningful access to each LEP individual, agencies should particularly address the appropriate mix of written and oral language assistance. Which documents must be translated, when oral translation is necessary, and whether such services must be immediately available will depend upon the factors previously mentioned.[14] Recipients often communicate with the public in writing, either on paper or over the Internet, and written translations are a highly effective way of communicating with large numbers of people who do not speak, read or understand English. While the Department of Justice's

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[14] Under the four-part analysis, for instance, Title VI would not require recipients to translate documents requested under a state equivalent of the Freedom of Information Act or Privacy Act, or to translate all state statutes or notices of rulemaking made generally available to the public. The focus of the analysis is the nature of the information being communicated, the intended or expected audience, and the cost of providing translations. In virtually all instances, one or more of these criteria would lead to the conclusion that recipients need not translate these types of documents.

Coordination Regulation, 28 CFR § 42.405(d)(1), expressly addresses requirements for provision of written language assistance, a recipient's obligation to provide meaningful opportunity is not limited to written translations. Oral communication between recipients and beneficiaries often is a necessary part of the exchange of information. Thus, a recipient that limits its language assistance to the provision of written materials may not be allowing LEP persons "effectively to be informed of or to participate in the program" in the same manner as persons who speak English.

In some cases, "meaningful opportunity" to benefit from the program requires the recipient to take steps to assure that translation services are promptly available. In some circumstances, instead of translating all of its written materials, a recipient may meet its obligation by making available oral assistance, or by commissioning written translations on reasonable request. It is the responsibility of federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments by applying their program expertise to concrete cases.

Conclusion

This document provides a general framework by which agencies can determine when LEP assistance is required in their federally assisted programs and activities and what the nature of that assistance should be. We expect agencies to implement this document by issuing guidance documents specific to their own recipients as contemplated by the Department of Justice Coordination

Regulations and as HHS and the Department of Education already have done. The Coordination and Review Section is available to assist you in preparing your agency-specific guidance. In addition, agencies should provide technical assistance to their recipients concerning the provision of appropriate LEP services.

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No. 99-1908

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ALABAMA DEPT. OF PUBLIC SAFETY AND ALABAMA DEPT. OF PUBLIC SAFETY,
Petitioners

v.

MARTHA SANDOVAL,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ENGLISH LANGUAGE ADVOCATES AND ENGLISH FIRST FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE STATE OF ALABAMA

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July 14, 2000

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QUESTIONS PRESENTED

Whether Congress intended to create a private cause of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

Note: *Amici curiae* respectfully suggest that the Question presented above fairly includes the following questions:

Whether Title VI of the Civil Rights Act of 1964 requires a state agency, which receives federal funds for some of its programs, to provide all services in any language demanded by applicants.

Whether a person's choice of language can be equated, under Title VI of the Civil Rights Act of 1964, to the person's national origin.

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INTEREST OF AMICI CURIAE

There are two amici curiae participating in this brief.[1] Counsel for all parties have consented to the filing of this brief.

English Language Advocates ("ELA") is a non-profit advocacy organization dedicated to the preservation and promotion of a common language – English – in American political and governmental life. ELA is an unincorporated project of U.S., Inc., of Petoskey, Michigan, a non-profit charitable and educational corporation. ELA and its President, Robert D. Park, have been the principal advocates for "official English" policies before the federal courts, including in *Arizonans for Official English and Robert D. Park v. Arizona*, Nos. 95-974 (*"AOE I"*) and 98-167 (*"AOE II"*).

English First Foundation ("EFF") is a national, non-profit charitable organization which studies the significance of the use of English in the United States and educates the public about the importance of preserving English as the common language of the United States. EFF conducts research, educational programs, seminars and conferences, and provides legal counseling and assistance. EFF was an *amicus curiae* in Nos. 98-404 and 98-564, *U.S. Dept. of Commerce v. U.S. House of Representatives,* and *Clinton v. Glavin*.

Amici ELA and EFF are deeply concerned about the effect of the Eleventh Circuit's equating language and

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[1]Pursuant to Rule 37.6, *amici* certify that no other person or entity made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

national origin. *Amici* are involved in efforts to promote the use of English as the language of government, and *amici* believe that equating language and national origin will both stop governments from requiring the use of English and force governments to provide services in languages other than English. Such an equation of language and national origin could have a substantial impact on *amici*'s activities.

SUMMARY OF ARGUMENT

In addition to the federalism questions raised in the Petition, the lower court decision raises many significant conflicts with decisions regarding governmental language choices. The lower court decision conflicts with numerous opinions of this Court and other circuit courts on four important topics:

Whether language can be equated to national origin. This Court has never held that language can be equated to national origin, yet the decision below adopted just that equation. The result is that the decision below conflicts with a substantial number of cases from other circuits which have found no such equation. Similarly, the lower court confused "national origin" with "foreign descent," in part because it ignored this Court's careful and limited description in *Espinoza v. Farah Mfg Co.*, 414 U.S. 86 (1973).

Whether government agencies must provide services in languages other than English. The court below unambiguously forced a State to provide services in languages other than English. This puts the lower court in direct conflict with at least four other circuits which have found no generalized requirement in Title

VI for examinations, services or notices to be in languages other than English.

Whether Title VII of the Civil Rights Act similarly equates language and national origin. The lower court mischaracterized employment-related discrimination law cases to equate language and national origin for Title VII purposes, giving undue credit to "guidelines" of the Equal Employment Opportunity Commission. This puts the lower court in direct conflict with at least four other circuits, which have found the EEOC "language-on-the-job" rules to be *ultra vires*, *Garcia v. Spun-Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994), or have found no such equation in Title VII.

Whether States can choose to use English. Similarly, the decision below conflicts with decisions of this Court protecting core rights of States to choose the English language for internal operations. In part this is a First Amendment issue, since the States are the "speakers," but the decision below also conflicts with this Court's decisions which recognize State sovereignty in matters of internal processes. Choice of language is a historically-based core power, stemming from the Founders' time and recognized by this Court over a hundred years ago. The lower court's rejection of those core rights rests on a limited education-related decision, not on a clear, remedial abrogation of these core rights in other contexts.

Finally, this issue is an important one, which is appearing with increasing frequency before the courts. Letting the lower court decision stand will endanger hundreds of State and local government policies which require the use of English or which in some way affect

those whose first language may not be English. If every government rule is to be tested against a standard of whether any person may demand government speak in a tongue other than English, then all government policies are at risk if they have any effect on those who are not entirely fluent in English. The costs of compliance alone would be enormous, and other circuits have not been willing to impose those costs on unwilling States. In light of this Court's Title VI jurisprudence, this cannot be the correct message to send to the lower courts.

This Court should issue the writ.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Those of Other Circuit Courts:

A) The Decision Below Conflicts with Other Courts Which Have Held that Language Cannot Be Equated With National Origin:

The lower court decision equated language and national origin. *Sandoval v. Hagan*, 197 F.3d 484, 508-09 (11th Cir. 1999). This equation was the issue briefed in *Hernandez v. New York*, No. 89-7645, but not addressed in the opinion in that case. 500 U.S. 352, 360 (1991)("Petitioner argues that Spanish-language ability bears a close relation to ethnicity, and that, as a result, it violates the Equal Protection Clause. . . We need not address that argument here."). The Court should now address this question directly to guide the lower courts

on the proper way to address these increasingly-frequent cases.

Numerous circuits have faced the question of whether to equate choice of language and national origin. The decision below is the first to equate language and national origin.[2] In doing so, the lower court ignored this Court's careful and limited reading of the phrase "national origin" in *Espinoza v. Farah Mfg. Co.* 414 U.S. 86 (1973).[3]

For example, the decision below explicitly equated language and national origin under Title VII of the Civil Rights Act. 197 F.3d at 510-11. In contrast, the Fifth Circuit held that "the EEO Act does not support

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[2]Ninth Circuit Judge Stephen Reinhardt came close to this equation in an opinion vacated by this Court, and cited in the decision below. 197 F.3d at 509 n. 26, (the "Supreme Court never has held that language may serve as a proxy for national origin for equal protection analysis")but *citing Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995), *vacated* 520 U.S. 43 (1997). *Compare* cases collected in *Kania v. Archdiocese of Philadelphia*, 14 F.Supp. 2d 730, 733 (E.D. Penn. 1998)("all of these courts have agreed that – particularly as applied to multi-lingual employees – an English-only rule does not have a disparate impact on the basis of national origin, and does not violate Title VII.").

[3]*Espinoza* appears only as part of a string cite in a footnote. 197 F.3d at 509 n. 26. Perhaps in consequence of failing to delineate the actual definition of "national origin," the lower court's opinion confuses "national origin" and "foreign descent." *See, e.g., id.* ("The Supreme Court has never held that language may serve as a proxy for national origin for equal protection analysis.") and 197 F.3d at 509 ("whether the English-only driver's license policy acted as a proxy for targeting residents of foreign descent. . .").

an interpretation that equates the language an employee prefers to use with his national origin." *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. den.*, 449 U.S. 113 (1981). Similarly, the Second Circuit has said "Language, by itself, does not identify members of a suspect class." *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. den.* 466 U.S. 929 (1984).

The decision below compounded this conflict by dismissing other conflicting rulings on the grounds that they involved "bilingual plaintiffs" who did not suffer an adverse impact from a rule requiring English useage. 197 F.3d at 499 ("While both courts rejected these claims, their decisions rested on the *bilingual* status of the plaintiffs." (emphasis in original)). Leaving aside the fact that the characterization was wrong, the decision below conflicts with other circuits' rulings in cases where the plaintiff could not speak English at all. *See, e.g., Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686, 687 (5th Cir. 1981)(rejecting section 1981 claim by monolingual Spanish-speaking truck driver).

B) The Decision Below Conflicts With Other Courts' In Requiring Government Agencies to Provide Services in Languages Other Than English:

Similarly, the decision below explicitly required a government agency which receives federal funds to provide services in languages other than English. 197 F.3d at 497 & n. 9. The lower court decision is already the basis for other suits designed to force government

agencies to provide services in languages other than English.[4]

In contrast, the Second, Sixth, Seventh and Ninth Circuits have found no requirement for examinations, services or notices to be in languages other than English. *Toure v. United States*, 24 F.3d 444, 446 (2nd Cir. 1994)(rejecting request for multilingual forfeiture notices); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975)(upholding English-language civil service examination, "In conducting the examination in English, the Commission violated no constitutional or civil right of Frontera"); *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999)("It has long been established that due process allows notice of a hearing (and its attendant procedures and consequences) to be given solely in English to a non-English speaker"); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973)(rejecting a claim for Spanish-speaking interpreters and permitting English language benefit termination notices).

C) The Decision Below Conflicts With Other Courts' Employment-Related (Title VII) Cases.

In addition, the decision below rested heavily on Title VII cases, asserting that employment-related cases had demonstrated some equation of language and

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[4] *See, e.g.*, Pulaski, "Latino Sues State for Discrimination," *The Oregonian*, June 10, 2000, www.oregonlive .com/news/oregonian/index.ssf?/news/oregonian/00/06/lc_71suit10. frame (suit to force Oregon Employment Department to use Spanish).

national origin for non-English-speaking applicants for government services (as opposed to bilingual employees). 197 F.3d at 509-10 & n. 27.

In fact, however, no circuit court has ever found such an equation in Title VII.[5] *See, e.g., Garcia v. Spun-Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. den.* 512 U.S. 1228 (1994)(EEOC Guidelines equating language and national origin were *ultra vires*); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(upholding English-on-the-job rule for non-English-speaking truck drivers); *Garcia v. Rush-Presbyterian St. Luke's Medical Center*, 660 F.2d 1217, 1222 (7th Cir. 1981)(upholding hiring practices requiring English proficiency); *Long v. First Union Corp.*, 894 F.Supp. 933, 941 (E.D. Virginia, 1995 ("there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job."), *affirmed*, 86 F.3d 1151 (4th Cir. 1996).

Leaving the lower court decision intact would mean that an applicant for government services could demand services in languages other than English in

[5]Judge Stephen Reinhardt of the Ninth Circuit has repeatedly pressed for such a rule, as in *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989). In *Gutierrez*, court employees racially insulted co-workers in a language they could not understand; Judge Reinhardt upheld a Title VII claim by those hurling the insults, suggesting that the employer's remedy was to fire African-American supervisors and hire Spanish-speakers. 838 F.2d at 1043. Several Ninth Circuit judges decried this opinion as a "let them eat cake" approach which would exacerbate workplace tensions. 861 F.2d 1187, 1194 (9th Cir. 1988). This Court vacated the *Gutierrez* opinion. 490 U.S. 1016 (1989).

Alabama, but not in Illinois, where *Nazarova* says clearly that hearing notices could "be given solely in English to a non-English speaker." 171 F.3d at 483.

And the lower court's decision would mean that an applicant could use her employment-related needs to demand government employment examinations in languages other than English in the Eleventh Circuit, but not in the Sixth, where *Frontera* says that employment exams may be given in English. 522 F.2d 1215.

This Court should grant the petition to avoid these situations where the outcome depends solely on where a case is brought.

II. The Decision Below Conflicts With Decisions of This Court Protecting Core Rights of the States to Choose English for Internal Operations.

The decision below will require the State to speak in a language which its political processes have decided will harm its interests.[6] This decision conflicts with this Court's historic recognition of States' rights to "regulate the content of what is or is not expressed when it is the speaker." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995). Though *Rosenberger* is a First Amendment case, it reflects this Court's concern for States' sovereignty.

A State defines itself as a sovereign "[t]hrough the structure of its government and the character of

[6]89% of Alabama's voters approved the State's English Language Amendment in 1990. Secretary of State, *Certification of Results of Election Held June 5, 1990*, June 20, 1990, 1.

those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Several of these areas of State sovereignty lie beyond the general reach of federal laws, including the regulation of a State's internal operations. "A State is entitled to order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2264 (1999)("Such plenary federal control of state government processes denigrates the separate sovereignty of the States.").

This is not a new thought, as this Court noted over a century ago: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970)(Black, J., joined by the Chief Justice and three other Justices)("And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").

Under this Court's recent decisions, the Tenth Amendment protects the reservation of "original powers" of a State. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 801 (1995); *Alden*, 119 S.Ct. at 2259, *quoting*, *Nevada v. Hall*, 440 U.S. 410, 425 (1979).

A State's Tenth Amendment right to choose the language of its own internal operations is one of those historically-based core powers. Throughout American history, this Court has permitted States to use English. *Patterson v. De La Ronde*, 8 Wall. 292, 299-300 (1869)(Court reconciled French and English versions of Louisiana mortgage law); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)("The power of the State to . . . make reasonable requirements for all schools, including a

requirement that they shall give instructions in English, is not questioned."). And prior to the Constitutional Convention, the primacy of English was well-established. "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence, 1763-1815*, 18 (1972).

Like the choice of location of its own State Capitol, a State's choice to use English in conducting its affairs is a "function essential to [the State's] separate and independent existence." *Coyle v. Wyoming*, 221 U.S. 559, 595 (1911). Choice of the English language for internal State operations is thus an "original power," core State function over which federal abrogation power is limited. Any federal abrogation, therefore, must be explicit and remedial. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, __ U.S. __, 119 S.Ct. 1354 (1999). There are few, if any, such abrogations, and those identified in the decision below are neither clear nor remedial.

The lower court seemed to rest its entire view of federal regulatory power over States' internal language choices on this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974)(school district must provide some assistance to students who could not otherwise obtain an education). *See, e.g.*, 197 F.3d at 495-97, 504-07. Yet *Lau* was a narrow decision, focused specifically on a particular problem in education, and not the type of clear, remedial abrogation envisioned by this Court's recent decisions. If left intact, the decision below will encourage other courts to use *Lau* to overrule States' internal decisions in other non-educational contexts,

shoving that narrow, education-based decision far beyond its original limits.

This Court should grant the petition to protect these core States' rights.

III. This Court Should Resolve This Important Issue.

The equation of language and national origin is a constantly-recurring subject in the lower courts across the country. In the last two years alone, in addition to this case, cases involving claims for special language-related privileges have been decided in Texas, Kansas, Pennsylvania, Florida and Illinois.[7]

All but one of these cases have upheld the right to use English. The lower court decision, on the other hand, would inevitably lead to challenges to all English-related rules. The imposition of blanket policies

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[7]*Magana v. Tarrant/Dallas Printing, Inc.*, 1998 WL 548686, *5 (unreported)(N.D. Texas, 1998)("English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII"); *Tran v. Standard Motor Products, Inc.*, 10 F.Supp.2d 1199, 1210 (D.Kansas, 1998)("the purported English-only policy does not constitute a hostile work environment"); *Kania, supra*, 14 F.Supp. 2d at 733; *EEOC v. Synchro-Start Products*, 29 F.Supp.2d 911 (N.D.Illinois, 1999)("crediting" the EEOC Title VII English-on-the-job guidelines); *Webb v. R&B Holding Co., Inc.*, 992 F.Supp. 1382, 1389 (S.D. Fla 1998) ("While this Court sincerely hopes that all employees of all cultures will choose to exercise common respect and courtesy, it cannot allow Title VII to be used as a sword by which one culture may achieve supremacy in the workplace over another."); *Gotfryd v. Book Covers, Inc.*, 1999 WL 20925 (N.D. Illinois, Jan 7, 1999) (English-on-the-job rule does not constitute a hostile workplace).

requiring use of languages other than English would be burdensome. As the Seventh Circuit noted in *Nazarova*,

> "the logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of the human race, and then select the proper one for each potential deportee. No court to our knowledge has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first."

171 F.3d at 483.[8]

The Second Circuit noted similar concerns in *Toure*, 24 F.3d at 446 (providing forfeiture notices in preferred language would "impose a patently unreasonable burden"), as have other courts in other contexts. *See, e.g., Carmona v. Sheffield*, 475 F.2d at 739 ("we believe that the additional burdens imposed on California's finite resources and California's interest in having to deal in only one language with all its citizens support the conclusion of reasonableness."); *Vialez v. New York City Housing Auth.*, 783 F.Supp. 109, 120-24 (S.D.N.Y. 1991)(requiring hearing notices in languages other than English "insurmountable and unjustified burden on the Housing Authority").

Since the potential burden on governments and individuals from this type of language mandate is so

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[8]Such language rules sometimes confound state judges. *See, e.g., Ayers v. Landow*, 666 A.2d 51, 56 n. 9 (D.C. 1995)("It has been held, for example, that a notice to quit is defective for purposes of a residential lease if it is not written in Spanish, even if the tenant speaks only English (or, for that matter, Slovak, Swedish or Swahili)." (Citations omitted.)

great, the Court should review the decision below and determine if federal law actually requires the use of languages other than English upon demand.

CONCLUSION

Amici therefore respectfully urge the Court to issue the writ and review this case.

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July 14, 2000

Supreme Court, U.S.
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(3)

No. 99-1908

In the

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress intended to create a private cause of action in federal court against a state agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) and the Center for Equal Opportunity respectfully submit this brief amici curiae in support of Petitioner.[1] Written consent for amici participation in this case has been obtained from all parties and has been lodged with the Clerk of the Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

Attorneys for Pacific Legal Foundation have previously litigated questions regarding the scope and meaning of Title VI of the Civil Rights Act of 1964. For example, Pacific Legal Foundation attorneys represented the California State Board of Education in a case alleging that California's Proposition 227, an initiative replacing bilingual education with English emersion, violated federal regulations promulgated pursuant to Section 602 of Title VI. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998). Pacific Legal Foundation also participated as amicus in *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999), a case alleging that minimum standardized testing scores had a disparate impact on African-American

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

student athletes in violation of regulations promulgated under Section 602 of the Civil Rights Act.

PLF has a long history of advocacy before this Court and has participated in numerous cases involving the interpretation of federal laws. For example, PLF was amicus curiae in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Center for Equal Opportunity (CEO) is an unincorporated project of the Equal Opportunity Foundation, Inc., a District of Columbia nonprofit corporation. CEO's main purpose is to study issues concerning race, ethnicity, and language. CEO has participated actively in cases involving the question of whether regulations promulgated pursuant to Section 602 of Title VI create a private right of action. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007. CEO has previously litigated civil rights cases before this Court. For example, CEO was amicus curiae in *Rice v. Cayetano*, 120 S. Ct. 1044 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

PLF and CEO believe their public policy perspective and litigation experience will provide an additional viewpoint on the legal issues presented.

INTRODUCTION

This case reaffirms Chief Justice Marshall's observation from nearly two centuries ago that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States v. Fisher*, 6 U.S. 358, 386 (1805). The court below was confronted with the question of whether there is "an implied private cause of action to

enforce agency regulations promulgated under Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1." *Sandoval v. Hagan*, 197 F.3d 484, 502 (11th Cir. 1999). In answering this question the court looked to the Third Circuit Court of Appeal's decision in *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted, sub nom.* 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998).

The *Seif* court had concluded that a private right of action to enforce agency regulations promulgated under Section 602 of Title VI does exist. This decision was based, in no small part, on what the Third Circuit perceived to be Congress' intent to create such a private cause of action. In reaching this decision, however, the Third Circuit misapplied this Court's teachings on the proper method of determining legislative intent. Specifically, the Third Circuit looked only to the congressional history surrounding the 1987 amendments to Title VI and did not, as this Court's precedents require, look to the intent of the Congress that initially passed the Civil Rights Act of 1964. The Third Circuit's error has been compounded by the decision below, which does not make an independent review of congressional intent but instead relies upon the Third Circuit's reasoning.

As both the court below and the Third Circuit recognized, this Court has never squarely addressed the issue of whether Title VI creates a private cause of action to enforce disparate impact regulations. *Sandoval*, 197 F.3d at 504 (noting that this Court "has yet to squarely answer" this question); *Seif*, 132 F.3d at 932 ("applicable Supreme Court precedent is not dispositive"). In the absence of guiding precedent from this Court, lower courts have and will continue to struggle with the question of whether an implied private cause of action exists to enforce Section 602 regulations. In this pursuit courts will (and have) seize everything from which aid can be derived, including the erroneous decision issued by the Third, and now the

Eleventh, Circuit Courts of Appeals. This Court should grant the petition for writ of certiorari in order to decide this important federal question.

STATEMENT OF THE CASE

The people of the State of Alabama amended their constitution to make English the official language of the state. Ala. Const. amend. 509. Pursuant to this amendment, the Alabama Department of Public Safety adopted a policy requiring that the state's driver's license examination be given only in English. *Sandoval*, 197 F.3d at 488. Martha Sandoval filed suit against the Alabama Department of Public Safety and its director L.N. Hagan, challenging this policy on behalf of herself and all others similarly situated. The suit alleged that Alabama's policy discriminated on the basis of national origin in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and its implementing regulations.

The United States District Court for the Middle District of Alabama certified a class consisting of all legal residents of the State of Alabama who are otherwise qualified to obtain a private vehicle driver's license but cannot do so because of the English language testing requirement. *Id.* at 488. The district court ruled that there was an implied right of action to enforce disparate impact regulations promulgated by the United States Departments of Justice and Transportation[2] and that Alabama's English-only driver's license testing requirement had a disparate impact on the basis of national origin. The court enjoined the use of the English-only testing policy. *Id.* at 489.

[2] The regulations on which this suit is predicated prohibit recipients of federal funding from "directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons [individuals] to discrimination based on their race, color, or national origin." 49 C.F.R. § 21.5(b)(2) and 28 C.F.R. § 42.104(b)(2).

The Eleventh Circuit Court of Appeals affirmed.[3] After looking to Eleventh Circuit precedent, which supported the claim that an implied private right of action exists under regulations promulgated pursuant to Section 602 of Title VI, the court noted that "[t]he only other circuit to have addressed the issue in detail" had also reached this conclusion. *Id.* at 504 (citing *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d at 936-37). The court explained that the *Seif* court had read this Court's precedent to "strongly suggest" that an implied cause of action exists under Section 602. *Id.* Rather than undertake an independent review of Title VI's legislative history, the court below was content to note that "[t]he *Seif* court then determined that an implied private right of action was supported both by Title VI's legislative scheme and legislative history." *Id.*

The court then turned to this Court's precedent and concluded:

> Although the Court has yet to squarely answer the question before us, we believe that a close reading of *Lau* [*v. Nichols*, 414 U.S. 563 (1974)], *Guardians* [*Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983)], and *Alexander*

[3] Before addressing the Title VI issue, the court below held that the suit was not barred by the Eleventh Amendment to the United States Constitution. The rationale for this conclusion was twofold. First, according to the court, by voluntarily accepting federal funding, the Alabama Department of Public Safety had waived any sovereign immunity claim. *Sandoval*, 197 F.3d at 500. Second, even if the action against the state were barred, the action against Director Hagan for injunctive relief could proceed under the *Ex Parte Young* doctrine. *Id.*

> [*v. Choate*, 469 U.S. 287 (1985)] necessarily establishes several holdings logically supporting an implied private cause of action under Section 602 of Title VI.

Id.

After concluding that an implied private cause of action does exist under Section 602, the court held that the district court did not err in its conclusion that the English-only examination requirement constituted a disparate impact on the basis of national origin. *Sandoval*, 197 F.3d at 511.

SUMMARY OF ARGUMENT

United States Supreme Court Rule 10(c) provides that a petition for writ of certiorari may be granted when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Each of these concerns is raised by this case.

First, as the court below acknowledged, the question of whether there exists an implied private cause of action to enforce agency regulations promulgated under Section 602 of Title VI has not been squarely answered by this Court. This claim is borne out by the precedent of this Court, the observations of lower courts and commentators, as well as this Court's decision to grant the petition for writ of certiorari in a case raising this issue.

Second, the court below endorsed and relied upon the Third Circuit's holding that the legislative history of Title VI supported a conclusion that an implied private cause of action does exist. The Third Circuit's analysis of whether Congress intended to create such a cause of action, however, conflicts with the relevant decisions of this Court regarding the proper method of determining congressional intent. Rather than

looking to evidence providing some indication of what the Congress originally ***enacting*** Title VI in 1964 intended, the Third Circuit relied solely upon legislative history generated by the Congress which ***amended*** Title VI in 1987. This formula for determining congressional intent has been repeatedly disavowed by this Court. Because the lower courts attempting to answer this important question of federal law have engaged in an analysis of legislative intent which is at odds with the holding of this Court, the petition should be granted.

ARGUMENT

I

THIS COURT HAS NOT YET DECIDED WHETHER THERE IS AN IMPLIED CAUSE OF ACTION TO ENFORCE AGENCY REGULATIONS PROMULGATED UNDER SECTION 602 OF TITLE VI

In *Guardians Association* this Court issued a highly fractured opinion from which a "two-pronged holding on the nature of the discrimination proscribed by Title VI emerged." *Alexander v. Choate*, 469 U.S. 287, 293 (1985). First, this Court made clear that a private cause of action may be brought pursuant to Section 601 of Title VI of the Civil Rights Act of 1964.[4] *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 607 n.27 (1983); *Alexander*, 469 U.S. at 293-94. As with a claim arising under the Fourteenth Amendment to the United States Constitution, an action predicated on Section 601 of Title VI requires the plaintiff to demonstrate discriminatory intent. *Alexander*, 469 U.S. at 293 ("Title VI itself directly reaches only instances

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[4] Section 601 of Title VI of the Civil Rights Act provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

of intentional discrimination."); ("Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.") *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (citations omitted).

This Court has also held that federal agencies have the authority under Section 602 of Title VI to promulgate regulations which prohibit recipients of federal funding from engaging in actions which have a disparate impact on the basis of race, color, or national origin. *Alexander*, 469 U.S. at 293-94 ("In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remedial, to warrant altering the practices of the federal grantees that had produced those impacts."). How these "two prongs" intersect, if at all, is a question that has not been addressed by the Court. In other words, may a Section 601 intentional discrimination private cause of action also be brought to enforce discriminatory impact regulations promulgated pursuant to Section 602?

Both the Third and Eleventh Circuits have recognized that this Court's precedent does not dispose of the issue. As the Third Circuit explained after reviewing this Court's Title VI jurisprudence:

> This inference from Guardians may be justified, but we find no direct authority in Alexander that either confirms or denies the existence of a private right of action. Consequently, we decline to hold that a private right of action exists based on Guardians and Alexander alone.

Seif, 132 F.3d at 931. ("Having determined that the applicable Supreme Court precedent is not dispositive, we look to our own precedent.") *Id.* at 932. The court below, although more

willing than the Third Circuit to look to this Court's precedent in an attempt to divine whether a private right of action existed to enforce Section 602 regulations, also noted that this Court's jurisprudence did not "squarely answer" the question. *Sandoval*, 197 F.3d at 504.

Nor are the Third and Eleventh Circuits alone in their conclusion that this Court's jurisprudence does not make clear whether there exists an implied private right of action to enforce Section 602 regulations. Commentators have also noted that this question remains undecided by this Court.

> Accordingly, five members of the Court implicitly recognized a private right of action for disparate impacts under Title VI's implementing regulations. However, because Guardians did not directly address whether a private right of action exists under Title VI's implementing regulations, the issue remains unresolved.

Badford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 Colum. J. Envtl. L. 1, 34 (1999) (footnotes omitted). *Accord* Jimmy White, *Comment: Environmental Justice: Is Disparate Impact Enough?*, 50 Mercer L. Rev. 1155, 1174 (1999) ("Whether a private right of action existed under the regulations was not, however, explicitly addressed in Guardians Ass'n.").

Perhaps the best evidence that *Guardians* and its progeny do not address the question presented by this case is found in the procedural history of the *Seif* case. In *Seif* the Third Circuit concluded that private plaintiffs could maintain an action under disparate impact regulations promulgated under Section 602 of Title VI. *Seif*, 132 F.3d at 937. James Seif, in his capacity as

Secretary of the Pennsylvania Department of Environmental Protection, and other State Defendants filed a petition for writ of certiorari which presented the sole question:

> Did Congress intend to create a private cause of action in federal court that bypasses a federal agency's review and enforcement process under Section 602 of Title VI of the Civil Rights Act of 1964, simply by alleging a discriminatory effect in the administration of programs and activities of a federally-funded State or local agency?

Petition for Writ of Certiorari at i, *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915 (1998) (No. 97-1620). This Court granted the petition for writ of certiorari. *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915. Following respondent's suggestion of mootness, the case was remanded to the United States Court of Appeals with instructions to dismiss. *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974 (1998) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)). This case presents the same important federal question that this Court agreed to consider in *Seif*. As other federal circuits, such as the court below, grapple with the issue of whether an implied cause of action exists to enforce agency regulations adopted pursuant to Section 602, there is an even greater need for guidance from this Court. This Court should grant the petition for writ of certiorari in this case, in order to address the important federal question that escaped review in *Seif*.

II

IN ATTEMPTING TO DETERMINE WHETHER CONGRESS INTENDED TO CREATE A PRIVATE CAUSE OF ACTION, LOWER COURTS HAVE MISAPPLIED THIS COURT'S PRECEDENT

Determining whether an implied right of action exists is governed by the four factors articulated by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975): (1) is the plaintiff one of the class for whose special benefit the statute was enacted; (2) is there any explicit or implicit indication of legislative intent to create or deny such a remedy; (3) is a private remedy consistent with the underlying purpose of the statute; and (4) is the cause of action one that is traditionally relegated to state law. Under this test the burden is on the plaintiffs to demonstrate that Congress intended to make a private remedy available. *Suter v. Artist M.*, 503 U.S. 347, 363 (1992). The "most important inquiry" is "whether Congress intended to create the private remedy sought by the plaintiffs." *Cort*, 503 U.S. at 364. "'What must ultimately be determined is whether Congress intended to create the private remedy asserted.'" *Id.* (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979)).

In *Seif* the Third Circuit reviewed the legislative history surrounding the 1987 amendments to Title VI and, based solely on this evidence, concluded that there was "some" indication in the legislative history "of an intent to create a private right of action, in satisfaction of the *Cort* factors." *Seif*, 132 F.3d at 934. The court below did not perform an independent review of Title VI's legislative history, instead it relied upon the conclusions reached by the *Seif* court. "The *Seif* court then determined that an implied private right of action was supported both by Title VI's legislative scheme and legislative history." *Sandoval*, 197 F.3d at 504. In attempting to divine congressional intent, the *Seif* court, and subsequently the court below, did not look to the intent of Congress that originally enacted Section 602. This mode of analysis is inconsistent with

the teachings of this Court. This Court should grant the petition in order to properly conduct the important inquiry into whether Congress intended to create the right of action sought by Respondent.

The first and best evidence of congressional intent is, of course, the language of the statute itself and where the language of the statute is clear, the inquiry into legislative intent generally need go no further. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). There is nothing on the face of Section 602 of Title VI indicating that Congress intended for this legislation to create a private cause of action.

Indeed, the language of Section 602 shows that Congress intended that only federal agencies would enforce the provision. The section provides in pertinent part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law: Provided, however, that *no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.*

42 U.S.C. § 2000d-1 (emphasis added).

Section 602 thus sets up two prongs to enforce compliance. Plainly, only federal agencies could enforce the first prong: termination or denial of financial assistance. The second prong, "any other means authorized by law," would include injunctive relief which on its face is not limited to federal agencies. However, the provision immediately following this remedy makes clear that Congress intended that it must be so limited. "[N]o such action" to use the "other means authorized by law . . . shall be taken until the department or agency concerned" has sought and failed to obtain compliance "by voluntary means." *Id.* This language makes clear the legislative intent that it is the federal "agency concerned" who is authorized to act by "other means authorized by law," including injunctive relief, but only after having attempted to obtain voluntary compliance. Such language plainly does not envision a private right of action and should have resolved the issue under the second *Cort v. Ash* factor.

The court of appeals' reliance on the subsequent legislative history of the 1987 amendments contravenes the rulings of this Court. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), required this Court to determine whether private civil liability under 10(b) of the Securities Exchange Act of 1934 extended beyond those persons who engaged in manipulative and deceptive practices to those who merely aided and abetted the violation. In an attempt to demonstrate that the Act did cover aiding and abetting liability, respondent in that case relied upon 1983 and 1988 Congressional Committee Reports. This Court rejected this attempt to use 1983 and 1988 indicia of congressional intent. "'[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.'" *Central Bank*, 511 U.S. at 185 (quoting *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989)). "In evaluating the

weight to be attached to these statements, we begin with the oft-repeated warning that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (quoting in part *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963)). As one commentator summarized this line of authority "[s]everal Supreme Court decisions suggest that a private right of action may be implied by courts only if the original Congress enacting a statute intended to create a private right, or a subsequent Congress explicitly amended the statute to do so." Mank, *supra*, at 44.

Both the Third and the Eleventh Circuits have ignored this "oft-repeated warning" and looked ***solely*** to the legislative history that was generated by the 1987 amendments to Title VI. In *Seif* the United States as amicus suggested, and the court agreed, that the implication of a private right of action was consistent with the legislative intent because Congress was aware of the existence of a private right of action when it amended Title VI in 1987. *Seif*, 132 F.3d at 933-34. The reasoning follows that because Congress was aware of this interpretation of Section 602, and did nothing to correct it, congressional silence on the matter constitutes acquiescence. This method of determining congressional intent is flawed for two reasons.

First, as was explained in Section I, *supra*, it is not at all clear from this Court's precedent that an implied private right of action does exist to enforce disparate impact regulations promulgated under Section 602. As the Third Circuit in *Seif* conceded, "*Guardians* did not explicitly address whether a private right of action exists under discriminatory effect regulations promulgated under section 602." *Seif*, 132 F.3d at 929. Hence, given the extreme uncertainty as to whether a right to bring a private cause of action under Section 602

regulations even exists, it is impossible to conclude that Congress has somehow endorsed this right.

Second, the idea of congressional acquiescence is doctrinally flawed. As this Court explained in *Central Bank*:

> Furthermore, our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. "It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation . . . ."'

Central Bank, 511 U.S. at 186 (quoting in part *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). *Accord Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle").

The Third Circuit's congressional intent analysis is fundamentally flawed. By looking only to congressional intent surrounding the 1987 amendments to Title VI, and ignoring the intent of the Congress that enacted Section 602 as expressed in the language of the section, the Third Circuit engaged in a method of determining legislative intent which has been expressly rejected by this Court. The errors made by the Third Circuit have now been compounded by the court below, which relied on the Third Circuit's conclusion that an implied private right of action was supported both by Title VI's legislative scheme and history. *Sandoval*, 197 F.3d at 504. This Court should grant the petition because both the Third and Eleventh Circuits have decided an important federal question in a way that conflicts with the relevant decisions of this Court.

CONCLUSION

In an attempt to determine whether there exists an implied private cause of action to enforce agency regulations promulgated under Section 602 of Title VI of the Civil Rights Act of 1964, the court below, as the Third Circuit before it, ignored the language of the Act and instead improperly relied on later legislative history. As both of these lower courts concluded, however, this Court has never squarely addressed this important federal issue of a private right of action. Absent a definitive opinion from this Court, lower courts will continue to struggle with this question.

DATED: July, 2000.

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No. 99-1908

IN THE
Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,
Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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27pp

QUESTION PRESENTED

Whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a State's violation of federal administrative regulations, issued pursuant to Section 602 of the Civil Rights Act of 1964, that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions.

Fairly encompassed within that question is the following subsidiary question:

Whether the U.S. Departments of Justice and Transportation exceeded the authority granted to them under Section 602 of the Civil Rights Act of 1964, when they adopted regulations that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a Washington, D.C.-based nonprofit public interest law firm with supporters in all 50 states, including Alabama.[1] WLF devotes a significant portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this and other federal courts in an effort to prevent unwarranted judicial expansion of federal civil rights laws. In particular, WLF has opposed attempts to incorporate "disparate impact" principles into cases decided under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* *See, e.g., Seif v. Chester Residents Concerned for Quality Living*, No. 97-1620, *cert. dismissed*, 524 U.S. 974 (1998); *Powell v. Ridge*, 187 F.3d 387 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are troubled by the broad scope of the decision below; they are concerned that it could result in judicial challenge to a broad range of facially neutral programs and policies administered by State actors and by private entities that receive federal funding. Indeed, numerous such challenges are pending.

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF, its supporters, and its counsel, made a monetary contribution to the preparation or submission of this brief.

Amici agree with Petitioners that the appeals court erred when it held that Congress intended to create a private right of action under regulations implementing Title VI of the Civil Rights Act of 1964 on behalf of individuals allegedly injured by policies that have a disparate impact on the basis of race, color, or national origin. No such right of action is set forth in the statute, and -- applying traditional rules of statutory construction -- there is no basis for inferring congressional intent to create such a right of action.

Amici write separately in order to emphasize an additional ground for concluding that Congress did not intend to create a private right of action to enforce Title VI disparate impact regulations. In adopting Title VI (which proscribes intentional discrimination only), Congress never intended to permit federal agencies to promulgate Title VI regulations incorporating a disparate impact standard. Because the regulations purporting to adopt such a standard were not authorized by Congress, it could not have intended to create a private right of action on behalf of those alleging injury as a result of violation of those regulations.

Amici are filing this brief with the consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt by reference the Statement of the Case contained in the Petition.

In brief, Petitioner Alabama Department of Public Safety (the "Department") is charged with licensing motor vehicle drivers within Alabama. In 1991, the Department

adopted a policy requiring all portions of the driver's license examination process to be administered in English.

Respondent Martha Sandoval filed suit against the policy in 1996, alleging that Alabama's English-only policy had a disparate impact on the foreign-born, who (Ms. Sandoval alleged) are more likely than U.S.-born residents to be unable to comprehend English. Ms. Sandoval alleged that the policy violated federal regulations designed to implement the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, *et seq*.[2]

Following a February 1998 trial, the district court granted the Department's motion for judgment as a matter of law on Ms. Sandoval's intentional discrimination claims. Pet. App. 64a. Ms. Sandoval has not appealed from that ruling. On June 3, 1998, the district court issued its opinion

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[2] Section 601 of Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602, 42 U.S.C. § 2000d-1, authorizes federal agencies that provide financial assistance to issue "rules, regulations, or orders of general applicability" in order to "effectuate the provisions of section 601." The Title VI regulations invoked by Ms. Sandoval in support of her claim are 49 C.F.R. § 21.5(b)(2) (Department of Transportation) and 28 C.F.R. § 42.104(b)(2) (Department of Justice), which require recipients of federal funds to not "directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting [individuals] to discrimination on the basis of their race, color, or national origin." *See* Petition Appendix ("Pet. App.") 5a n2.

rendering judgment for Ms. Sandoval, based on a disparate impact standard. Pet. App. 58a-254a. The court found: (1) the federal regulations adopting a disparate impact standard were valid (*id.* at 74a n.11); (2) the Department was a recipient of federal funds within the meaning of Title VI (*id.* at 76a-82a); (3) Congress impliedly created a direct cause of action on behalf of those discriminated against in violation of the Title VI regulations (*id.* at 82a-117a); (4) Ms. Sandoval had standing (*id.* at 117a-125a); (5) the Eleventh Amendment did not bar Ms. Sandoval's claims for injunctive relief (*id.* at 125a-149a); (6) Alabama's English-only policy had a disparate impact on those born outside the United States (*id.* at 149a-205a); and (7) Alabama did not meet its burden of demonstrating that the English-only policy had a "substantial legitimate justification" (*id.* at 205a-246a). The court enjoined enforcement of the English-only policy and ordered the parties to meet in an effort to agree on a new policy. *Id.* at 252a-254a.

The Eleventh Circuit affirmed. *Id.* at 1a-57a. The appeals court upheld the validity the Department of Transportation and Department of Justice Title VI regulations imposing a disparate impact standard, stating that this Court held in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), that federal agencies "have the authority to promulgate regulations under Section 602 that prohibit federal funding recipients from taking any action that *results* in a disparate impact or produces discriminatory *effects* on the basis of race, color, or national origin." Pet. App. 35a-36a (emphasis in original).[3]

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[3] The appeals court stated that the Department "concede[d] that these agency implementing regulations are valid exercises of agency authority (continued...)

The appeals court also found that Congress impliedly created a private right of action to enforce the disparate impact regulations. *Id.* at 34a-48a.[4] The court based that finding primarily on its reading of this Court's opinions in *Guardians* and *Alexander v. Choate*, 469 U.S. 287 (1985).

Finally, the appeals court affirmed the trial court findings that the English-only rule had a disparate impact on foreign-borns and that the Department had failed to provide adequate justification for the rule. Pet. App. 48a-56a. Accordingly, the appeals court affirmed the trial court's grant of injunctive relief.

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[3](...continued)
under Section 2000d-1." *Id.* at 5a n.2. That statement is incorrect; the Department made no such concession. The Department's Eleventh Circuit brief merely recited what the various *Guardians* opinions said regarding the validity of the disparate impact regulations (Brief at 28), and then noted that later Supreme Court case law "rejected an attempt by private plaintiffs to assert a disparate impact claim under Title VI regulations." 11th Circuit Brief at 29 (citing *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992)). Furthermore, the appeals court recognized later in its opinion that the Department was, indeed, challenging the regulations, stating, "Appellants argue that the Supreme Court in *United States v. Fordice* overruled *Guardians*. . ." Pet App. 47a n.24.

[4] The appeals court did not consider whether 42 U.S.C. § 1983 created an *express* right of action to enforce the Title VI disparate impact regulations against State actors. The court stated that Ms. Sandoval had chosen not to assert a right of action under § 1983 but rather to rely solely "on Section 602 directly." *Id.* at 45a n.21. In the absence of assertion of a § 1983 claim, Ms. Sandoval's cause of action must rise or fall on the existence of an implied right of action under § 602 to enforce the disparate impact regulations. Any plaintiff asserting a right of action under § 1983 would need to overcome significant hurdles. *See Middlesex County Sewerage Auth. v. National Sea Clammers Assn*, 453 U.S. 1 (1981).

The Department's certiorari petition presents a single issue for review: whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a State's violation of federal Title VI regulations that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions. Fairly encompassed within that issue is the validity of those regulations -- because there can be no basis for inferring a congressional intent to create a private right of action to enforce disparate impact regulations if Congress never intended to permit such regulations.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning whether a federal agency may validly promulgate a regulation that incorporates a disparate impact standard under Title VI of the Civil Rights Act, when the statutory and constitutional authority under which the agency acts reaches only cases of intentional discrimination. This Court has never squarely addressed that question, although it has made statements in several decisions that have led lower courts, such as the Eleventh Circuit below, to surmise erroneously that a federal agency may do so.

In particular, the Eleventh Circuit and numerous other lower federal courts have wrongly interpreted this Court's decisions in *Guardians* and *Alexander* as holding that agency regulations under Title VI that incorporate a disparate impact standard are valid. So pervasive is the error that at least eight other federal courts of appeal have assumed (based on *Guardians*) that the validity of such agency regulations is not an open question, even though this Court has never squarely addressed the issue. Most recently, in

United States v. Fordice, 505 U.S. 717, 732 n.7 (1992), the Court indicated that agency regulations under Title VI did *not* extend beyond the protection provided by the Fourteenth Amendment, but the Eleventh Circuit ignored *Fordice*'s admonition under the mistaken belief that the Court had settled the issue in *Guardians* and *Alexander*.

At the very least, *Fordice* made clear that the validity of the Title VI disparate impact regulations is an open question in this Court, yet the federal appeals courts have failed to grasp that fact. Review is warranted in order to correct the appeals courts' widespread misinterpretation of *Guardians* and to decide, once and for all, the validity of the Title VI disparate impact regulations.

As outlined below, the Title VI disparate impact regulations are being invoked with increasing frequency in the last several years, in a wide number of contexts. That development lends urgency to the need for resolution of the important issues of federal law raised in this case.

Amici fully support the Department's contention that, even if the disparate impact regulations are valid, Congress did not intend to create a private right of action to enforce those regulations. But more fundamentally, because federal agencies may not issue Title VI regulations incorporating a disparate impact test, the Eleventh Circuit erred in finding a private right of action to enforce such regulations.[5]

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[5] The fundamental question of whether the disparate impact regulations are valid is therefore a "subsidiary question fairly included" within the question presented by Petitioners. SUP. CT. R. 14.1(a). Alternatively, WLF submits that this presents a question of law that is a

(continued...)

I. THE DECISION BELOW WAS BASED ON THE ERRONEOUS ASSUMPTION THAT *GUARDIANS* DETERMINED THAT CONGRESS AUTHORIZED FEDERAL AGENCIES TO INCORPORATE A DISPARATE IMPACT STANDARD INTO TITLE VI REGULATIONS

The Department is subject to Title VI by virtue of its receipt of funding from the U.S. Department of Transportation (DOT). Consideration of whether DOT could validly incorporate a disparate impact standard into its Title VI regulations must begin with the Constitution and Title VI itself. The Court has held that the Equal Protection Clause prohibits only instances of intentional discrimination and does not address conduct that has a disparate impact on protected groups but is not intentionally discriminatory. *Washington v. Davis,* 426 U.S. 229 (1976). The Court has also held that Title VI extends no farther than the Equal Protection Clause and thus that a Title VI claim cannot be established based solely on disparate impact evidence. *Fordice,* 505 U.S. at 732 n.7; *Regents v. Bakke,* 438 U.S. 281, 284-87 (1978) (Powell, J., concurring in the judgment); *id.* at 328 (Brennan, White, Marshall, and Blackmun, JJ, concurring in the judgment in part and dissenting in part). Indeed, the Eleventh Circuit acknowledged that Ms. Sandoval's failure to demonstrate discriminatory intent in this case precluded a cause of action under either Title VI or the Equal Protection Clause. Pet. App. 34a.

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[5](...continued)
"predicate to an intelligent resolution" of the question on which this Court would grant certiorari. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980).

Having properly acknowledged the limited scope of protection provided by the Constitution and Title VI, the Eleventh Circuit then embarked on a misguided analytical detour, based on a misreading of this Court's decisions. The appeals court stated that this Court's decisions in *Guardians* and *Alexander* held that a federal agency's issuance of disparate impact regulations is a valid exercise of its authority under Section 602, 42 U.S.C. § 2000d-1. Pet. App. 35a-37a. However, properly read, neither of those decisions encompasses such a broad and erroneous holding.

Guardians involved an allegation that a last-hired/ first-fired policy for lay-offs of police officers had a disparate impact on black and Hispanic police officers because officers were hired in order of their examination scores, and members of those racial groups on average scored lower on the examinations. The Second Circuit denied the plaintiffs' damages claim under Title VI on the ground that a Title VI cause of action requires proof of discriminatory intent.

A fractured Supreme Court affirmed, but without producing a majority opinion. Seven Justices agreed that no Title VI cause of action could be established in the absence of evidence of intentional discrimination. *Guardians,* 463 U.S. at 610 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 642 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). However, the Court was far less united in its views regarding the Title VI disparate impact regulations. Four Justices who voted to affirm the Second Circuit stated that administrative agencies could not validly incorporate a disparate impact standard into Title VI regulations once it

had been determined that Title VI itself did not incorporate such a standard. *Id.* at 611 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.); *id.* at 613 (O'Connor, J., concurring in the judgment). The four dissenting Justices stated that the disparate impact regulations were valid. *Id.* at 623 (Marshall, J., dissenting); *id.* at 645 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). Justice White stated that the Second Circuit should be affirmed on the ground that monetary relief is unavailable in an action brought pursuant to the Title VI regulations where there is no allegation of intentional discrimination. *Id.* at 593-98 (White, J., concurring in the judgment). Justice White also stated in *dictum* that the Title VI disparate impact regulations were valid, but that *dictum* played no part in the disposition of the case. *Id.* at 589-93.

Because five Justices in *Guardians* (the four dissenters plus Justice White) stated that the Title VI disparate impact regulations were valid, the Eleventh Circuit concluded that *Guardians* "held" that those regulations were valid. But as the Court emphasized once again just this past term, "This is simply not the way that reasoned constitutional adjudication proceeds." *United States v. Morrison,* 120 S. Ct. 1740, 1757 (2000). One cannot glean the Court's "holding" in a case by adding together the views of concurring and dissenting Justices, even when the sum is five or greater. Rather, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Nichols v. United States*, 511 U.S. 738, 745 (1994) (quoting from *Marks v. United States,* 430 U.S. 188, 193 (1977)). Thus, in *Morrison* the Court rejected the argument that a view joined

in by three concurring Justices and three dissenting Justices constituted a "holding" of the Court in *United States v. Guest,* 383 U.S. 745 (1966). *Morrison,* 120 S. Ct. at 1757.

Accordingly, the only "holding" in *Guardians* is the narrowest grounds agreed to among the five Justices who voted to affirm the Second Circuit's decision -- namely, that without evidence of discriminatory intent, there can be no cause of action for damages based on violation of Title VI or its implementing regulations. The Eleventh Circuit's finding that *Guardians* had upheld the Title VI disparate impact regulations was based on its erroneous belief that a "holding" can be discerned by adding together the views of concurring and dissenting Justices.

The appeals court also claimed that the Court upheld the Title VI disparate impact regulations in *Alexander.* Pet. App. 36a, 38a. That claim is a misreading of *Alexander*, which had nothing to do with Title VI but rather involved the Rehabilitation Act of 1973 (the "Act"), a law loosely patterned after Title VI. The plaintiffs in that case were Medicaid recipients who sought declaratory and injunctive relief from a State's reduction in the number of inpatient hospital days that the State's Medicaid program would pay on behalf of the recipients. *Alexander,* 469 U.S. at 289. The plaintiffs alleged that the State's reduction had a disparate impact on the handicapped and thus violated the Act and its implementing regulations. The unanimous and limited holding of the Court was that the plaintiffs' allegations were not cognizable under the Rehabilitation Act or its implementing regulations. *Id.* at 309. The Court's opinion includes a brief discussion of *Guardians* (*id.* at 292-94) and Title VI, but that discussion is clearly *dicta* given that *Alexander* did not involve a Title VI claim and given

that the holding in the case was that the plaintiffs did *not* state a claim under the Act or its implementing regulations.

Any suggestion that the Court has already upheld the Title VI disparate impact regulations was laid to rest by *Fordice*, a suit (brought by private plaintiffs and the United States) alleging that Mississippi had not done enough to eradicate the lingering effects of past segregation in its higher education system. In response to the private plaintiffs' claims that Title VI and its implementing regulations required Mississippi to do more to eradicate those effects, the Court stated:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, *citing a regulation* to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.* We thus treat the issues in these cases as they are implicated under the Constitution.

Id. at 732, n.7 (emphasis added) (citations omitted).

The appeals court noted this passage but rejected the Department's argument that the passage called into doubt the validity of the Title VI regulations, stating, "Nor are we persuaded that the Supreme Court would have overruled *Guardians* without *any* discussion of its precedent and in so oblique a manner as suggested by Appellants." Pet. App. 48a n.24. But the appeals court's rationale for brushing off *Fordice* proceeds from a faulty premise: *Guardians* did *not* hold that the regulations were valid, and thus there would

have been no need for *Fordice* to "overrule" *Guardians* in order to question their validity.

Because the Court has never directly ruled on the validity of Title VI disparate impact regulations, an important issue of federal law that arises repeatedly in the lower federal courts, *amici* urge the Court to grant the Petition in order to decide that issue once and for all.

II. BECAUSE CONGRESS DID NOT ADOPT A DISPARATE IMPACT STANDARD FOR TITLE VI SUITS, IT CANNOT BE DEEMED TO HAVE AUTHORIZED AGENCIES TO ADOPT THAT STANDARD IN THEIR IMPLEMENTING REGULATIONS

The Court should grant the Petition for the additional reason that the appeals court's decision is inconsistent with this Court's interpretation of Title VI.

Both Respondent and the Eleventh Circuit concede that a Title VI cause of action requires proof of discriminatory intent. Pet. App. 34a. Section 602, 42 U.S.C. § 2000d-1, authorizes federal agencies disbursing federal funds to issue "rules, regulations, or orders of general applicability" in order "to effectuate the [anti-discrimination] provisions" of § 601. Given that § 601 does *not* incorporate a disparate impact standard, it is difficult to discern how regulations incorporating such a standard could be said to "effectuate" the provisions of § 601.

As Justice O'Connor explained in *Guardians*:

> Such regulations do not simply "further" the purpose of Title VI; they go well *beyond* that purpose. . . . Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute, . . . we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with."

Guardians, 463 U.S. at 613-15 (O'Connor, J., concurring in the judgment) (citation omitted).

This is not a case where room for agency discretion in defining the scope of prohibited conduct was necessary because it was impractical for Congress to enact specific limitations. Within constitutional limits, Congress could have determined that the dangers of discrimination warranted extending Title VI protections beyond instances of intentional discrimination. That it did not do so must be regarded by this Court as a deliberate policy choice, and not as a deferral to administrative agencies to make the decision instead. The difference between prohibiting discriminatory intent and disparate impact represents precisely the type of broad public policy decision that rests in the hands of our elected legislatures, and not administrative agencies. Under these circumstances, DOT's decision to incorporate a disparate impact standard into its Title VI regulations is not entitled to deference. *See Guardians*, 463 U.S. at 611 n.5 (Powell, J., concurring in the judgment) ("I do not question the view that the Court should sustain a reasonable administrative interpretation even if we would have reached a different result had the question initially arisen in a

judicial proceeding. . . . But I know of no precedent whatever for asserting that this deference to administrative interpretation is proper *after* this Court already has issued a definitive -- and contrary -- construction of its own.") (citation omitted).

The Court should grant the Petition in order to correct the Eleventh Circuit's error in interpreting Title VI, an error that has been repeated by numerous courts of appeals.

III. REVIEW IS WARRANTED DUE TO THE SIGNIFICANT INCREASE IN TITLE VI DISPARATE IMPACT PROCEEDINGS

Ms. Sandoval's disparate impact challenge to Alabama's driver's license procedures is not an isolated example of use of Title VI disparate impact regulations to challenge practices heretofore thought by many to be largely unobjectionable.[6] To the contrary, creative litigants have begun to rely on the regulations to challenge a broad range of longstanding government practices. Although the regulations have been on the books for several decades, it is only in the past few years that lawyers have begun to focus on them as a potent litigating weapon. This recent sharp rise in proceedings under the Title VI regulations provides an additional reason why review is warranted.

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[6] English-only rules are widespread and, until recently, have drawn little objection. With a few isolated exceptions (*e.g.*, public education and criminal court proceedings), neither the federal government nor States have previously felt obliged to address residents in a language other than English. As the Department points out, for example, the Seventh Circuit has upheld the federal Immigration and Naturalization Service's decision not to print its forms and notices in Russian for the benefit of those of born in Russia. *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999).

For example, the federal Environmental Protection Agency recently issued its "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits," published at 65 Fed. Reg. 39,650 (June 27, 2000). This EPA guidance document extends the Title VI disparate impact concept to applications for EPA permits. Under EPA's new view of its Title VI regulations, citizens may file a federal suit to block the grant of an EPA permit to an industrial facility located in their community by demonstrating that other communities, with lesser concentrations of members of the plaintiffs' particular racial group, are host to fewer sources of industrial pollution. Evidence of discriminatory intent would be unnecessary. Indeed, the Title VI regulations case in which the court granted certiorari in 1998 was just such an "environmental justice" suit. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998).

The U.S. Department of Education recently issued a draft guidance document elaborating on its Title VI regulations. The guidance document is a thinly veiled threat of enforcement action against colleges that fail to decrease their reliance on standardized tests (such as the SAT and the ACT) in the admissions process because those tests have been shown to have a disparate impact on certain racial minority groups. *See* U.S. Department of Education, Office for Civil Rights, "The Use of Tests When Making High-Stakes Decisions for Students: A Resource Guide for Educators and Policymakers" (July 6, 2000).

Title VI disparate impact lawsuits abound in the area of education, as those adversely affected by education selection criteria have sought in recent years to invoke the Title VI regulations to challenge those criteria. *See, e.g., Cureton v. National Collegiate Athletic Ass'n*, 198 F.3d 107 (3d Cir. 1999) (NCAA academic criteria for freshman participation in intercollegiate athletics alleged to have disparate impact on African-Americans); *Ass'n of Mexican-American Educators v. California*, No. 96-17131 (9th Cir. 1999), rehearing en banc granted (9th Cir. 2000) (Title VI disparate impact challenge to use of CBEST test in California teacher certification decisions); *White v. Engler* (E.D. Mich., filed June 27, 2000) (Title VI disparate impact challenge to use of MEAP test scores to award state college scholarships). Such suits are troubling in light of their potential to undermine academic freedom. The Court traditionally has been wary of causes of action that require courts to second-guess the academic decisions of professional educators. *See, e.g., Bd. of Regents v. Southworth*, 120 S. Ct. 1346 (2000).

The recent rise in efforts to expand and enforce the Title VI disparate impact regulations may in large part be attributable to a July 14, 1994 memorandum from Attorney General Janet Reno to all "heads of departments and agencies that provide federal financial assistance," instructing them to "ensure that the disparate impact provisions in your [Title VI] regulations are fully utilized." *See generally*, R. Clegg, *The Bad Law of Disparate Impact*, THE PUBLIC INTEREST 79 (Jan. 1, 2000). Whatever the cause, the increased enforcement activity makes it just that much more important for the Court to determine once and for all whether Congress intended to permit federal agencies to incorporate a disparate impact standard into their Title VI regulations.

IV. RECOGNITION OF A PRIVATE RIGHT OF ACTION TO ENFORCE TITLE VI REGULATIONS IS INCONSISTENT WITH THE STATUTORY LANGUAGE

As demonstrated above, Congress did not authorize federal agencies to issue Title VI regulations incorporating a disparate impact standard, and thus it could not have intended to create a private right of action to enforce such regulations. But even if the disparate impact regulations are valid, *amici* fully support the Department's contention that recognition of a private right of action to enforce those regulations is inconsistent with the language of Title VI. The Eleventh Circuit's disregard of that language provides an additional reason to grant review in this case.

Section 602 contains the statutory language authorizing federal agencies to issue regulations in order "to effectuate" the anti-discrimination provisions of § 601. Section 602 goes on to spell out the manner in which any such regulations may be enforced:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, . . . or (2) by any other means authorized by law. *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

42 U.S.C. § 2000d-1.

Congress could not have been more plain that compliance with any regulations issued pursuant to § 602 may be enforced in only one of two ways, neither of which includes a private right of action by those alleging injury as a result of violation of the regulations. An implied private right of action cannot fairly be termed "other means authorized by law" in the absence of specific law authorizing the right of action. Even if one accepted the argument that an implied private right of action can fairly be included within the phrase "other means authorized by law," Ms. Sandoval's cause of action cannot be sustained because she has not met the prerequisites for suit set forth in § 602: advice to the Department from DOT that the Department is not in compliance with DOT regulations, and DOT's inability to secure compliance by voluntary means. *See Cannon v. University of Chicago,* 441 U.S. 677, 713 n.49 (1979).

In arriving at the opposite conclusion, the lower courts essentially ignored the language of § 602. Instead, they focused on legislative history and a desire to effectuate congressional purpose to combat discrimination. Pet. App. 94a-117a, 42a-48a. But this Court need look no farther than the language of § 602 to determine that there is no implied private right of action to enforce Title VI regulations issued pursuant to § 602. The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15 (1979). Any effort to discern congressional intent "must begin with the language of the statute itself." *Id.* at 16. Once, as here, an examination of the statutory language makes plain that Congress did not intend to create a private right of action,

the Court's "inquiry is at an end," regardless whether (as Ms. Sandoval contends she is) the plaintiff is within the class intended to be protected by the regulations. *Id.* at 24.

The lower courts took the position that § 602's creation of express means of enforcing the § 602 regulations is not by itself evidence that Congress did not create other, implied means of enforcement. But that argument ignores the plain language of § 602, which states unequivocally that "no action shall be taken" to enforce the regulations until the prerequisites set forth in § 602 have been met. As the Court explained under similar circumstances in *Transamerica*:

> Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.

Id. at 19-20 (citation omitted).

The Court should grant review in this case in order to correct the Eleventh Circuit's erroneous interpretation of § 602, an error that has been repeated by other appeals courts.

CONCLUSION

Amici curiae respectfully request that the Court grant the Petition.

Respectfully submitted,

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Counsel wish to thank Kimberly Pruett and Chip Searcy, students at Texas Tech University Law School, for their assistance in preparing this brief.

(7)

No. 99-1908

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In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF U.S. ENGLISH AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July 31, 2000

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QUESTION PRESENTED

Whether Congress intended to create a private right of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

No. 99-1908

In the Supreme Court of the United States

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Petitioners,

v.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF U.S. ENGLISH AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE[1]

U.S. English is a national, non-partisan, non-profit, citizens' action group dedicated to preserving the unifying role of a common language in America. Current membership is over 1.4 million nationwide.

U.S. English was established in 1983 by the Honorable S.I. Hayakawa, noted educator, former United States Senator from California, and himself an immigrant to the United States. Senator Hayakawa's overriding concern in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Office of the Clerk of this Court. *See* Sup. Ct. R. 37.3.

founding U.S. English was to ensure that English would continue to serve as an integrating force among our nation's many ethnic and linguistic groups, and that English would remain a vehicle of opportunity for new Americans. In his own words, "English is the key to full participation in the opportunities of American life."

Today U.S. English consists of two independent entities: U.S. English, Inc., a tax-exempt 501(c)(4) organization, which advocates the interests of its supporters before Federal and state legislatures and agencies; and U.S. English Foundation, Inc., a tax-exempt 501(c)(3) organization which disseminates information, sponsors educational programs, represents interests of official English advocates before state and Federal courts, and conducts research on language issues.

U.S. English supporters recognize the importance of preserving English as our common language for our national unity, equal opportunity, and economic advancement.

SUMMARY OF ARGUMENT

Amicus U.S. English endorses the Alabama Petitioners' reasons for certiorari, *i.e.*, that this case presents an important Title VI question, certiorari for which the Court granted but then did not resolve in *Seif*,[2] and that recipients of federal grants throughout the country "have an interest in knowing the scope of the obligations they assume" by taking federal grants, which "interest is frustrated when private

[2] *Seif v. Chester Residents Concerned for Quality Living*, cert. granted, 118 S. Ct. 2296, vacated as moot, 119 S. Ct. 22 (1998). The question presented (and accepted by the Court) in *Seif* was: "Did Congress intend to create a private cause of action in federal court that bypasses a federal agency's review and enforcement process under Section 602 of Title VI of the Civil Rights Act of 1964, simply by alleging a discriminatory effect in the administration of programs and activities of a federally-funded State or local agency?"

litigants direct disparate effect lawsuits at policies and practices that are not intentionally discriminatory and are unrelated to the purpose of the grant." In addition, *Amicus* respectfully submits that certiorari is warranted for three compelling ancillary reasons:

1. The Court of Appeals' holding that Alabama's official English drivers license testing policy is flatly at odds with a myriad of federal statutes and regulations that recognize, either directly or indirectly, the English language as the official language of the United States;

2. The Court of Appeals' holding that "Title VI flatly prohibits . . . English language policies that cause disparate impact on the basis of national origin" (citing *Lau v. Nichols*, 414 U.S. 563 (1974)) contorts this Court's ruling in *Lau*, the underlying premise of which was that ethnically Chinese American citizens who do not understand English need to be taught English first in order to participate fully in public schools; and

3. The Court of Appeals' holding that when "Spending Clause legislation functions as a quasi-contract between Congress and the States . . . , agency regulations are accorded substantial deference in assessing whether they outline a permissible construction of a congressional statute's purpose," is contrary to the rule of construction applied in *United States v. Heth*, 3 Cranch 399, 413 (1806) (Paterson, J.) ("[T]he words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law-makers."); *see Vermont Agency of Natural Resources v. United States*, 120 S. Ct. 1858 (2000).

REASONS FOR GRANTING CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO RECONCILE THE APPLICATION OF DISPARATE IMPACT REGULATIONS WITH THE MULTITUDE OF LAWS REQUIRING USE OF OR FACILITY WITH THE ENGLISH LANGUAGE

The issue of whether there is an implied private right of action to enforce Title VI disparate impact regulations is important yet unsettled. It is important because of the ramifications of allowing private litigants to enforce ambiguous provisions of Title VI of the Civil Rights Act, especially where, as here, Section 602 has been stretched beyond the limits of federal agency implementation. That this Court granted certiorari in *Seif* two years ago, but then avoided the accepted issue (on account of mootness in that case), indicates that the opinions of the various circuit courts, whether expressed in holdings or dicta, are unsettled.

As Petitioners note, Section 602 of the Civil Rights Act provides an elaborate process to ensure that an agency's finding of a disparate effect claim is well-founded and thoroughly considered. "Primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance."[3] An agency may issue an order finding a grant recipient's practice to have caused a disparate impact on the basis of national origin only after providing an opportunity for a hearing. The agency must also first attempt to obtain voluntary compliance. Grant funds may not be terminated or denied pursuant to such a finding until the agency notifies Congress, provides Congress with a full

[3] 28 C.F.R. §50.3(b).

written report, and waits thirty days to give Congress time to review the report.[4]

Although Congress authorized federal agencies to enforce Title VI of the Civil Rights Act by establishing disparate impact regulations, Congress circumscribed that authority by requiring agencies to follow a process and to alert Congress to their findings before they are made effective. Allowing a private right of action that bypasses this elaborate congressional scheme deprives grant recipients of the procedural protections contained in the statute and recited above. It would also allow private litigants to pursue enforcement in situations where the federal agency with "[p]rimary responsibility for prompt and vigorous enforcement of Title VI"[5] has elected not to pursue.

Allowing a private right of action to enforce the disparate impact regulations promulgated by the U.S. Departments of Transportation[6] and Justice[7] violates the doctrine of "primary jurisdiction,"[8] which in this case has resulted in a series of judicial rulings below that are utterly at odds with the substantive regulations of both Departments. How is it that Alabama's English-language requirement to obtain a driver's license is illegal, yet facility with the English language is a U.S. Department of Transportation ("DOT") prerequisite to operate an aircraft or commercial motor vehicle, or to serve as an able seaman? How is it that Alabama's requirement that driving tests be administered only in English is illegal while access to U.S. Department of

[4] 42 U.S.C. §2000d-1.

[5] 28 C.F.R. §50.3(b).

[6] 49 C.F.R. §21.5(b)(2).

[7] 28 C.F.R. §42.104(b)(2).

[8] *See United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-63 (1956) ("The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.").

Justice ("DOJ") administrative adjudicatory processes – as well as to the Supreme Court of the United States – is available only to those who submit documents in English?

Neither Congress nor the agencies entrusted by Congress to enforce Section 601 by rule, regulation, or order have mandated this anomalous result. Alabama is subject to this ruling only because the lower courts: (1) granted Martha Sandoval a private right of action, and (2) assuming the mantle of a federal regulatory agency under Section 602, equated Alabama's English-language drivers test with national origin discrimination.

A survey of the United States Code and Code of Federal Regulations would reveal more than three hundred references to the English language.[9] While some of these references require the federal government, state or local government, school, or private business to make reasonable accommodations to those who cannot speak, read, or write the English language, the vast majority of them require applications, records, reports, labels, manuals, and other documents to be submitted in the English language.[10] Thus,

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[9] These explicit references to the English language in essence reflect the universal practice in the federal government that all agency adjudications and rulemaking proceedings are conducted only in English. As the Sixth Circuit stated in *Frontera v. Sindell*, 522 F.2d 1215, 1220 (1975), "It cannot be gainsaid that the common, national language of the United States is English. Our laws are printed in English and our legislatures conduct their business in English." *See* S.I. Hayakawa explaining the purposes and effects of Official English; 127 Cong. Rec. S3998-99 (daily ed. April 27, 1981)(reproduced in the Appendix).

[10] DOT and its modal administrations, such as the National Highway Traffic Safety Administration (NHTSA) and the Maritime Administration, require the English language to be used on labels, *e.g.*, 49 C.F.R. §555.9 (temporary exemption labels), in petitions, *e.g.*, 49 C.F.R. §552.4 (petitions for rulemaking, defect, and noncompliance orders), in applications, *e.g.*, 46 C.F.R. §249.6(c) (application for approval of marine hull insurance underwriters), and in tariffs, *e.g.*, 14 C.F.R. §221.4 (tariffs and other documents filed with the Office of the Secretary).

in order for a person to participate in an agency rulemaking, seek a determination by a federal agency, apply for a grant or permit from a federal agency, that person typically must be able to speak, read, and understand English.

Heretofore, these requirements have been upheld against challenges that the failure to provide hearings, instructions, or other notice in the language of the non-English speaking person amounts to a denial of due process. In *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999), the Court of Appeals held that the INS' failure to provide notice of the consequences of Nazarova's failure to appear on time at her deportation hearing in her native Russian did not violate due process. To hold otherwise would present:

> a broad and troublesome position: the logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of the human race, and then select the proper one for each potential deportee. No court to our knowledge has even held that the Constitution requires the INS to undertake such a burden, and we will not be the first.

171 F.3d at 483.[11]

Moreover, where public safety is involved, three DOT modal administrations require proficiency with the English language to obtain a permit to operate a vehicle or perform a safety-related function. Even private pilots, the

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[11] *See also, Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (failure to provide notice of seizure of currency in French rather than English did not violate due process); *Soberol-Perez v. Heckler*, 717 F.2d 36, 43 (7th Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) (failure to provide notice to Social Security claimants in did not violated due process); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (failure to conduct Civil Service Commission exam in language other than English did not violate Constitution).

aviation analog to private motor vehicle operators, are required by the Federal Aviation Administration ("FAA") to "read, speak, write, and understand the English language."[12] Coast Guard regulations require "able seamen" to "speak and understand the English language as would be required in performing the general duties of an able seaman and during an emergency aboard ship"[13]; other maritime personnel are subject to similar requirements.[14] The Federal Highway Administration requires drivers of commercial motor vehicles to "read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records."[15]

Other federal agencies with authority to safeguard the public health and safety, such as the Food Safety and Inspection Service of the Agriculture Department, the Consumer Product Safety Commission, the Environmental Protection Agency, the Food and Drug Administration, and the Bureau of Alcohol, Tobacco, and Firearms, all require labels and manuals to be written in English.

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[12] 14 C.F.R. §61.103. In Title 14 of the Code of Federal Regulations, the FAA requires that an applicant for the following certificates "read, speak, write, and understand the English language": instrument ratings, §61.65; private pilot based on foreign pilot license, §61.75; student pilot, §61.83; recreational pilot, §61.96; private pilot, §61.103; commercial pilot, §61.123; airline transport pilot, §61.153; flight instructor, §61.183; ground instructor, §61.213; flight engineer, §63.31; flight navigator, §63.51; air traffic control tower operator, §65.33; aircraft dispatcher, §65.53; mechanic, §65.71; repairman, §65.10; and parachute rigger, §65.113.

[13] 46 C.F.R. §12.05-3(a).

[14] *E.g.*, 46 C.F.R. §12.10-3(b) (lifeboatmen); 46 C.F.R. §12.15-3(c) (engine department personnel).

[15] 49 C.F.R. §391.11(b). Similarly, persons who transport migrant workers are subject to the same requirements. 49 C.F.R. §398.3(c).

The DOJ Rules of Practice governing administrative hearings involving allegations of unlawful employment of aliens, unfair immigration-related employment practices, and document fraud require that "all documents presented by a party in a proceeding must be in the English language or, if in a foreign language, accompanied by a certified translation."[16]

Similarly, the rules of this Supreme Court of the United States of America provide that all foreign language documents must be accompanied by an English translation.[17]

Amicus is not aware of any specific federal requirement, whether imposed by regulation or order under authority of Section 602, that a recipient of federal funds must take affirmative steps to accommodate non-English speaking persons in any area other education and voting. Certainly there is no such specific requirement imposed by DOT or DOJ on Alabama or any other State to administer public health or safety-based programs in English or to grant safety-based permits to engage in activities with potential risk to the public to those who do not read, speak, or understand English.[18]

In its brief to the Court of Appeals below, the most the United States could say about the federal "law" Alabama

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[16] 28 C.F.R. §68.7(e). Also, all submissions to the Justice Department required by the Foreign Agents Registration Act must be in the English language. 28 C.F.R. §5.206(a).

[17] Sup. Ct. R. 31("Translations").

[18] The DOJ regulation cited with approval by the Court of Appeals, 28 C.F.R. §42.405(d)(1), is inapposite. That regulation requires grant recipients to provide foreign language assistance where a significant number of persons likely to be affected by a federally assisted program "needs service or information in a language other than English in order effectively to be informed of or to participate in the program." We doubt this regulation would be cited by DOJ for the proposition that Alabama must administer its drivers test in each applicant's native or spoken language, yet this is the clear implication of the Court of Appeals' ruling.

is said to have violated was: "Policies that require fluency in English in order to receive benefits can have a disparate impact on the basis of national origin. The Supreme Court so held in Lau v. Nichols, 414 U.S. 563 (1974), and the agencies responsible for implementing Title VI have consistently espoused that view in regulations and interpretive guidance." Brief for the United States as Intervenor and as Amicus Curiae, filed January 11, 1999, at 6. These federal "regulations and interpretive guidance" are neither express legal authority nor the "Rule of Law."[19]

This lack of express legal authority is not surprising, given that English-language requirements are prevalent throughout the federal government. It is also not surprising, given the difficulty, if not impossibility, with crafting an appropriate remedy, one that accommodates the non-English speaking persons but neither compromises the public health or safety nor imposes unreasonable burdens on the grant recipients. Here, the only specific remedy ordered by the district court, in an order granting a stay pending appeal, was to require Alabama to administer the driver's test in seven

[19] In *Marbury v. Madison,* Chief Justice John Marshall stressed that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." 5 U.S. (1 Cranch) 137, 163 (1803). "Rule of Law . . . means that the government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F. von Hayek, *The Road to Serfdom* 72 (1944); *see* S. von Pufendorf, VII *De Jure Naturae et Gentuim: Libri Octo* Ch. VI, §11 (1688) (C.H. & W.A. Oldfather trans. 1934) ("[I]t is clear in what sense its to be taken the statement of the ancient Greek writers on politics and their followers, namely, that the government of a state should be committed to laws rather than to men. For that can have no other fit meaning than this: Care should be taken that those who rule should govern the commonwealth according to the direction of established laws, rather than by their own private and uncircumscribed pleasure." (Citation omitted)).

languages other than English.[20] If it indeed is a violation of Section 602 to administer a driver's test to a non-English speaking person in English, there is no principled limit to this ruling. If there is only one person who speaks a particular language in the entire State of Alabama, or perhaps five or ten, why would they not be entitled to administration of the test in their own native language?[21]

II. *LAU V. NICHOLS* NEEDS CLARIFICATION

Amicus endorses Alabama's argument, for the reasons stated in their Petition at 15-18, that this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974), does not support the Court of Appeals' holding that a private right of action is available under Section 602. *Amicus* would add that *Lau*, if it remains "good law," also does not support the Court of Appeals' holding that Alabama's English-language requirements for drivers constitutes national origin discrimination in violation of Section 602.

This case presents this Court with a clear opportunity to clarify the continuing validity of *Lau*, both with respect to whether a private right of action exists under Section 602 and whether a disparate effect violates Title VI itself. The lengths to which the Court of Appeals went in discussing *Lau*

[20] The district court initially ordered Alabama to make "reasonable accommodations" to non-English speaking applicants, without specifying what accommodations would suffice.

[21] *Cf. Lau v. Nichols*, 414 U.S. at 572 (Blackmun, J., and Burger, C.J., concurring in the result)("I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of the case and my concurrence is to be understood accordingly.").

in the wake of this Court's decisions in *Alexander v. Choate*, 469 U.S. 287 (1985), *Guardians Assn. v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983), *University of California Board of Regents v. Bakke*, 438 U.S. 265 (1978) and *United States v. Fordice*, 505 U.S. 717 (1992), demonstrate the need for this Court to straighten out this uncertain body of law.

In *Lau*, the Supreme Court held that the failure of the San Francisco public schools to either provide English language instruction to Chinese-speaking students or teach these students in Chinese violated regulations promulgated by the Department of Health, Education and Welfare ("HEW") pursuant to its authority under Section 602 to enforce the nondiscrimination provision in Section 601. The underlying premise of *Lau* was that ethnically Chinese American citizens need to be taught English first in order to participate fully in the federally funded San Francisco public schools.

In several respects, *Lau* neither dictates nor suggests the holding of the Court of Appeals. First, the Court in *Lau* did not determine the remedy for this violation. Indeed, it noted that "[n]"o specific remedy is urged upon us." 414 U.S. at 564. Here, the Court of Appeals did not hold illegal Alabama's failure to provide English-language instruction to enable non-English speaking persons to qualify for a driver's license. Instead, it found illegal the failure of Alabama to allow non-English speaking persons the privilege to drive without learning even the basics of English. This finding is inconsistent with the remedy implicitly recommended by this Court in *Lau*: "the [school] district must take affirmative steps to rectify the language deficiency . . . ." 414 U.S. at 568 (quoting HEW clarifying guidelines) (internal quotes omitted).

Second, three concurring Justices in *Lau* focused on interpretive guidelines issued by the HEW Office of Civil

Rights, which "clearly indicate that affirmative efforts to give special training for non-English speaking pupils are required by Title VI as a condition for receipt of federal aid to public schools." 414 U.S. at 570 (Stewart, J., with Burger, C.J. and Blackmun, J., concurring in the result). Unlike the HEW regulations and guidelines at issue in *Lau*, DOT and DOJ regulations do not require any affirmative steps to be taken by grant recipients with respect to non-English speaking drivers.

Third, the HEW regulations at issue in *Lau* pertained to education, not the public health and safety. Where education is concerned, federal requirements are geared to ensuring that all students are given a meaningful education. Where the public health and safety is implicated, federal requirements ensure that labels, instructions, warnings, and signals are in English so that they can be understood and observed. For those performing safety functions, including commercial operators of motor vehicles, federal requirements provide that they must be able to speak, read, write, and understand the English language. While the Eleventh Circuit gave no weight to the safety rationale behind Alabama's English-language requirements, it is obvious that the English-language requirements of federal agencies, most notably the grantor department in this case, DOT, are based primarily if not entirely on safety.

Thus, far from following *Lau*, the Court of Appeals transformed *Lau* into something this Court has never countenanced, and should not embrace now.[22]

III. WHEN SPENDING CLAUSE LEGISLATION FUNCTIONS AS A QUASI-CONTRACT BETWEEN CONGRESS AND A

[22] For these same reasons, the Court of Appeals erred in finding that *Lau* provided Alabama with notice that its English-language requirements were suspect.

STATE, AMBIGUITIES SHOULD BE CONSTRUED *CONTRA PROFERENTEM*

The Eleventh Circuit's holding that when "Spending Clause legislation functions as a quasi-contract between Congress and the States . . . , agency regulations are accorded substantial deference in assessing whether they outline a permissible construction of a congressional statute's purpose," is contrary to the rule that ambiguous words in a contract be construed *contra proferentem,* as well as to two related rules of construction applied by this Court recently in a federalism statutory construction context. *Vermont Agency of Natural Resources v. United States*, 120 S. Ct. at 1870.

A. Spending Clause Legislation Impinging Upon Unconsenting States Raises Federalism Issues Not Yet Resolved by This Court

The Spending Clause remains a significant exception to the rule that the federal government "may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). In *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), this Court recognized "the 'constitutional difficulties' with imposing affirmative obligations on the States pursuant to the spending power. That issue, however, is not now before us." 451 U.S. at 17 n.13. At least one such unresolved "constitutional difficulty" is squarely presented in this case.

If the Eleventh Circuit's holding below becomes the law of this land, the executive and judicial branches of the federal government will have effectively compelled the fifty States to administer an expansive interpretation of Title VI contractual obligations. As such, this case presents a statutory delegation of legislative authority "not canalized within banks that keep it from overflowing." *A.L.A.*

Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring), and a concomitant urgent need for this Court to update its guidance for lower courts: "[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.,* 120 S. Ct. 1291, 1315 (2000); *see Loving v. United States*, 517 U.S. 748, 770 (1996) ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." (citations omitted)).

As of this Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), *United States v. Butler*, 297 U.S. 1 (1936), was "the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause." 483 U.S. at 216 (O'Connor, J., dissenting). In *Butler*, Congress through the Agricultural Adjustment Act had attempted to regulate through the spending power. *See* 483 U.S. at 216. The Court's analysis in *Butler* came down to a fundamental federalism analysis, equally applicable in this case: "The question is not what power the federal government has, but what powers in fact have been given by the people." 297 U.S. at 63.

In her dissent in *South Dakota v. Dole*, Justice O'Connor, while "subscrib[ing] to the established proposition that the reach of the spending power 'is not limited by the direct grants of legislative power found in the Constitution,'" 483 U.S. at 212-13 (quoting *Butler*), also identified two essential attributes of a legitimate exercise of the spending power: "the conditions imposed must be unambiguous"; and "the statute is entirely unambiguous." 483 U.S. at 213 (citations omitted). In this case, both the conditions and the statute are at best ambiguous. Neither Title VI nor the DOT's implementing regulations (both

included in the appendix to Alabama's Petition) even hint that Alabama's English-only drivers license testing policy violates Title VI.

The only federal regulations arguably unambiguous on this issue are EEOC guidelines that the U.S. Court of Appeals for the Ninth Circuit flatly rejected in *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) (rejecting the EEOC's "English-only rule Guidelines," 29 C.F.R. §1606.7(a) (1991),[23] as applied in a Title VII disparate impact case against a private sector employer.

In 1992, this Court applied the *Butler* federalism analysis to strike down the low-level Radioactive Waste Policy Amendments of 1985 as having crossed "line distinguishing encouragement from coercion." *New York v. United States*, 505 U.S. 144, 175 (1992). "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require States to regulate." 505 U.S. at 177.

Although *Butler* and *New York* both involved coercive acts of Congress, the *Butler/New York* analysis applies equally to coercive acts of federal agencies and courts: "The question is not what power the federal government has, but what powers in fact have been given by the people" 297 U.S. at 63 (quoted at 505 U.S. at 157). *Amicus* respectfully suggests that the people have never given the federal government the power to frustrate Alabama's efforts to empower all of its citizens through

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[23] "The EEOC enacted this scheme in part because of its conclusion that English-only rules may 'create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.' 29 CFR § 1606.7(a)." 998 F.2d at 1489. For an authoritative and comprehensive explanation of the nondiscriminatory and empowering purposes of Official English laws, see S.I. Hayakawa, 127 Cong. Rec. S3998-99 (daily ed. April 27, 1981) (reproduced in the Appendix).

nondiscriminatory policies that encourage facility in our common language, English, such as Alabama's English-only drivers license testing requirement.

B. Quasi-Contractual Ambiguities Ought to Be Construed Against Congress

Federal "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

For the same "considerations" reiterated recently by this Court in *Vermont Agency of Natural Resources, supra,* 120 S. Ct. at 1870, it is critical that Spending Clause contracts between the federal government and the States be interpreted according to the plain terms of those contracts, with any ambiguities being construed in favor of the States. Under the approach taken by the Eleventh Circuit and other courts of appeals, however, any ambiguities in Title VI contracts can be construed after-the-fact by the federal agencies, the contractual parties who proffered – ostensibly by delegated legislative authority – the ambiguous language. *But see United States v. Heth, supra*, 3 Cranch at 409 (Johnson, J.) ("If it be necessary that the court should make an election between [alternative constructions of ambiguous statutory] words, . . . the words should be taken most strongly '*contra proferentem.*'"); 3 Cranch at 413 (Paterson, J.)

("[T]he words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law-makers."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (Scalia, J. & Thomas, J., concurring in the judgment in part and dissenting in part) ("[A]ny ambiguity concerning [a preemption clause's] scope will be read in favor of preserving state power.").[24]

Finally, if the "not canalized within banks" coercive power of the national government is allowed to stand in this case, involving a sovereign State as defendant, its effects will spill over into the private sector vis-à-vis parallel disparate impact provisions of Titles VI and VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act ("ADEA"). *Compare, e.g., Garcia v. Spun Steak Co., supra*, (rejecting the EEOC's "English-only rule Guidelines, as applied in a Title VII disparate impact case against a private sector employer), *with Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2105 (2000) ("This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here.").

Amicus respectfully suggest that when this Court focuses on the legislative intent behind Title VI as applied to this case, the question presented by the Alabama Petitioners, as urgent as it is for this Court to resolve, answers itself: "The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that

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[24] *See generally Mesa Air Group, Inc. v. Department of Transportation*, 87 F.3d 498, 506 (D.C. Cir. 1996) (buttressing the appellate court's federal government-private party contractual analysis with *contra proferentem*).

Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst*, 451 U.S. at 16-17 (emphasis in original). "Our conclusion is buttressed by two other considerations that we think it unnecessary to discuss at any length: first, 'the ordinary rule of statutory construction' that 'if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute,' and , second, the doctrine that statutes should be construed to avoid difficult constitutional questions." *Vermont Agency of Natural Resources, supra,* 120 S. Ct. at 1870 (internal citations omitted).

CONCLUSION

For the reasons stated in the Alabama Petition and in this *amicus* brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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July 31, 2000

APPENDIX

SENATOR S.I. HAYAKAWA ON THE PURPOSE AND EFFECTS OF OFFICIAL ENGLISH
27 CONG. REC. S3998-99
(DAILY ED. APRIL 27, 1981)

[L]anguage is a powerful tool. A common language can unify; separate languages can fracture and fragment a society. The American "melting pot" has succeeded in creating a vibrant new culture among peoples of many different cultural backgrounds largely because of the widespread use of a common language, English.

Learning English has been the primary task of every immigrant group for two centuries. Participation in the common language has rapidly made available to each new group the political and economic benefits of American society. Those who have mastered English have overcome the major hurdle to full participation in our democracy.

Today I am introducing a constitutional amendment declaring as the law of the land what is already a political and social reality: That English is the official language of the United States.

This amendment is needed to clarify the confusing signals we have given in recent years to immigrant groups. For example, the requirements for naturalization as a U.S. citizen say you must be able to "read, write, and speak words in ordinary usage in the English language." And though you must be a citizen to vote, some recent legislation has required bilingual ballots in some areas. This amendment would end that contradictory, logically conflicting, situation.

Bilingual education programs were originally designed to help non-English-speaking children learn English quickly so they could join the mainstream of education and

of our society. The Carter administration attempted to substantially broaden this mandate by proposing requirements for schools to teach other academic subjects entirely in students' native language.

I am proposing this amendment because I believe that we are being dishonest with the linguistic minority groups if we tell them they can take full part in American life without learning the English language. We may wish it were otherwise, but it simply is not so. As the son of an immigrant to an English-speaking country, I know this from personal experience. If I spoke no English, my world would be limited to the Japanese-speaking community, and no matter how talented I was, I could never do business, seek employment, or take part in public affairs outside that community.

Let me explain what the amendment will do, upon its passage by Congress and ratification by three-fourths of the States:

It will establish English as the official language of State, Federal, and local government business;

It will abolish requirements for bilingual election materials;

It will allow transitional instruction in English for non-English speaking students, but do away with requirements for foreign language instruction in other academic subjects;

It will end the false promise being made to new immigrants that English is unnecessary for them.

On the other hand, and this is important, there are things the amendment will not do:

It will not prevent the use of any other language within communities, churches, or cultural schools.

That is, Yiddish schools, Hispanic schools, Japanese, and Chinese schools are perfectly all right insofar as their support by local communities, but not by the taxpayer.

It will not prevent the use of second languages for the purpose of public convenience and safety, for example on signs in public places, but it will not allow governments to require multilingual postings or publications.

I am thinking, Mr. President, of such signs as you see in the street sometimes, "Danger, construction area." If this sign is put up in a building lot in Chinatown, let us say, there is certainly no objection whatsoever to putting signs to that effect in Chinese or any other language that is appropriate for the passerby. So, for purposes of public convenience and safety, other languages may be used wherever necessary. I think that what we have, in Washington, Los Angeles, and San Francisco, street signs in Chinese or Japanese, are perfectly acceptable, because they are also accompanied by street signs in English. They are also acceptable because they give a cosmopolitan flavor to those cities that have them and we are proud of the fact that we are a cosmopolitan culture.

My amendment, Mr. President, will not prevent public schools from offering instruction in other languages, nor will it prevent schools and colleges from requiring some study of a foreign language.

Incidentally, Mr. President, we are crippled in international relations because of our imperfect command not only of the well known languages like Spanish, French, German, or Italian, but we have very few speakers of Chinese, Japanese, Russian, Hungarian, Arabic, Thai -- some languages some people here ought to know so they can serve our Nation intelligently in diplomatic service or in trade. If we have a huge trade deficit vis-à-vis Japan, for example, it is because they have some Japanese salesmen speaking English in New York, Chicago, Los Angeles, and elsewhere, but we have very, very few Japanese-speaking Americans doing a selling job in Tokyo or Osaka.

So, at the same time that I declare English to be the official language of the United States, I am not trying to discourage foreign language studies.

The ability to forge unity from diversity makes our society strong. We need all the elements, Germans, Hispanics, Hellenes, Italians, Chinese, all the cultures that make our Nation unique. Unless we have a common basis for communicating and sharing ideas, we all lose. The purpose of this proposal is to insure that American democracy always strives to include in its mainstream everyone who aspires to citizenship, to insure that no one gets locked out by permanent language barriers.

(25)

Supreme Court, U.S.
FILED
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CLERK

No. 99-1908

IN THE
Supreme Court of the United States

JAMES ALEXANDER, *in his official capacity as the Director of the Alabama Department of Public Safety*, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,
Petitioners,

v.

MARTHA SANDOVAL,
Individually and on Behalf of All Others Similarly Situated,
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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36 pp

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RELEVANT DOCKET ENTRIES

BEFORE THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA CASE NO. CV-96-D-1875-N

1.	12/31/96	Complaint
2.	1/21/97	Answer
3.	5/6/97	Motion by Martha Sandoval to Certify Class
4.	6/5/97	Motion by L.N. Hagan, Dept. of Public Safety to amend answer
5.	9/3/97	Report and Recommendations of Mag. Judge Susan R. Walker Re: motion to certify class; that the motion to certify the class be granted and that the named plaintiff be certified as the representative of the class of all legal residents of the State of Alabama who are otherwise qualified to obtain a class D private vehicle driver's license but cannot do so because they are not sufficiently fluent in English
6.	10/17/97	Order adopting report and recommendation; granting motion to certify class; that named plaintiff is certified as representative of the class
7.	10/24/97_	Motion by L.N. Hagan, Dept. of Public Safety for Summary Judgment
8.	10/24/97	Memorandum by L.N. Hagan, Dept. of Public Safety in support of motion for summary judgment by Dept. of Public Safety, L.N. Hagan

9.	11/25/97	Response by Martha Sandoval in opposition to motion for summary judgment
10.	12/5/97	Reply brief by L.N. Hagan, Dept. of Public Safety in support of motion for summary judgment
11.	12/24/97	Supplement to opposition by Martha Sandoval to motion for summary judgment
12.	1/6/98	Response by defendants to supplement to plaintiffs' opposition to defendants' motion for summary judgment
13.	2/9/98	Supplemental authority by Martha Sandoval concerning motion for summary judgment by Dept. of Public Safety, L.N. Hagan
14.	2/11/98	Pretrial Stipulations by parties
15.	2/12/98	Order denying motion for summary judgment
16.	2/17/98	Plaintiffs' memorandum regarding 42 U.S.C. Section 1981 claim
17.	2/17/98	Defendants' position regarding plaintiffs' claims under 42 U.S.C. Section 1981
18.	2/18/98	Non-jury trial held before Judge Ira DeMent on 2/17/98 through 2/18/98
19.	2/18/98	Courtroom Deputy's minutes of proceedings: non-jury trial held 2/17/98 through 2/18/98 before Judge Ira DeMent; 2/18/98 - defendants' oral motion for entry of judgment in favor of defendant as to intentional discrimination - granted; 2/18/98 - defendants' oral motion for entry of judgment in favor of

		defendant as to disparate impact theory - denied; granting defendants' motion for summary judgment on 1981 claim; 2/18/98 - defendants' oral motion for judgment as a matter of law - reserving ruling
20.	2/24/98	Motion by Martha Sandoval to supplement the record with data regarding illiteracy
21.	2/24/98	Post-trial brief by Martha Sandoval
22.	2/27/98	Post-trial brief by L.N. Hagan, Dept. of Public Safety
23.	2/27/98	Motion by L.N. Hagan, Dept. of Public Safety to supplement record
24.	3/2/98	Stamped order granting motion to supplement the record with data regarding illiteracy
25.	3/2/98	Stamped order granting motion to supplement record
26.	3/2/98	Order that by 10:00 a.m., 3/5/98, plaintiffs file a memorandum or brief responding to the Eleventh Amendment issues raised by the defendants
27.	3/5/98	Motion by Martha Sandoval to amend complaint
28.	3/5/98	Supplemental trial-brief by Martha Sandoval
29.	3/6/98	Reply by L.N. Hagan, Dept. of Public Safety to supplemental trial brief by Martha Sandoval, and response to motion to amend complaint by Martha Sandoval

30.	3/13/98	Motion by L.N. Hagan, Dept. of Public Safety to submit additional authority and brief argument relating to plaintiffs' Title VI claim
31.	3/17/98	Stamped order granting motion to submit additional authority and brief argument relating to plaintiffs' Title VI claim
32.	3/19/98	Motion by Martha Sandoval for Leave to File response to defendants 3/13 submission
33.	3/23/98	Plaintiffs' response to defendants' March 13 submission re: plaintiffs' Title VI claim
34.	6/3/98	Memorandum opinion, judgment, declaration, order and permanent injunction
35.	6/3/98	Judgment
36.	6/3/98	Amendment to complaint by Martha Sandoval
37.	6/17/98	Motion by Martha Sandoval to alter or amend judgment re: memorandum opinion and order
38.	6/23/98	Motion by L.N. Hagan, Dept. of Public Safety for stay pending appeal
39.	7/6/98	Response by Martha Sandoval to motion for stay pending appeal
40.	7/9/98	Joint motion by Martha Sandoval, L.N. Hagan, Dept. of Public Safety for entry of stay
41.	7/13/98	Order (1) plaintiffs' motion to alter or amend judgment be and the same is hereby granted; reserving ruling on plaintiffs' claim that the defendants

		violate the Equal Protection Clause by discriminating on the basis of language; (2) defendants' motion to stay pending appeal be and the same is hereby denied as moot; (3) the parties' joint motion for entry of stay be and the same is hereby granted; staying the injunctive terms of the court's 6-3-98 memorandum opinion pending appellate review; directing the parties to abide by the terms of their agreement as set forth in their 7-9-98 joint motion
42.	7/28/98	Notice of appeal by L.N. Hagan and the Alabama Department of Public Safety to the United States Court of Appeals, Eleventh Circuit from the Memorandum Opinion, Judgment and Declaration Order and Permanent Injunction entered on June 3, 1998
43.	8/3/98	Notice of appeal and certified copy of docket to USCA
44.	3/2/00	Received copy of per curiam: rendered 2/29/00 of the U.S. Court of Appeals, Eleventh Circuit, denying the petition for rehearing en banc
45.	4/20/00	Judgment of USCA issued as mandate 4/19/00 re: appeal by L.N. Hagan, affirming the judgment of the District Court, further ordered that defendants-appellants pay to plaintiffs-appellees

[Filed Dec. 31, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARTHA SANDOVAL, individually and on behalf of all others similarly situated, Plaintiff,	)	
vs.	)	COMPLAINT
L.N. HAGAN, in his official capacity as the Director of the Alabama Department of Public Safety,	)	Case No. CV-96-D-1875-N
and	)	
ALABAMA DEPARTMENT OF PUBLIC SAFETY, Defendants.	)	

NATURE OF THE ACTION

1. This is a civil action brought under the United States Constitution and federal civil rights law. Plaintiff seeks relief to prohibit the defendants from continuing their practice of administering driver's license examinations only in English. The defendants' refusal to administer the examination in languages other than English or to allow for the use of translators or interpretive aids discriminates against the plaintiff and others similarly situated on the basis of national origin. The defendants' practices impose extreme hardships on persons like the plaintiff.

JURISDICTION

2. This action arises under the Fourteenth Amendment to the United States Constitution, 42 U.S.C.§ 1983, 42 U.S.C.§ 1981, and 42 U.S.C. § 2000d and its implementing regulations. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1343.

3. The plaintiff's request for declaratory relief is authorized by 28 U.S.C. §§ 2201-2202.

PARTIES

4. Plaintiff Martha Sandoval is an adult legal resident of the United States and of Mobile County, Alabama.

5. Defendant L.N. Hagan is Director of the Alabama Department of Public Safety. He has the duty and responsibility to establish and promulgate rules and regulations concerning the operation of motor vehicles, including rules and regulations regarding driver's license examinations. He is sued in his official capacity.

6. Defendant Department of Public Safety is the state agency responsible for the administration of driver's license examinations in Alabama. The Department receives federal financial assistance from the United States Department of Justice for the administration of its programs and activities.

CLASS ACTION

7. Plaintiff Sandoval brings this suit on her own behalf and on behalf of the class of all present and future legal residents of Alabama who have been or may be denied the opportunity to obtain a driver's license in the state because of their inability to speak or read English fluently.

8. The prerequisites of Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure are satisfied.

STATEMENT OF FACTS

9. Alabama law requires every Alabama resident to obtain a driver's license before driving a motor vehicle upon the highways of the state. Any resident who drives a motor vehicle in this state without first obtaining a driver's license is guilty of a misdemeanor crime and is subject to fines and penalties.

10. On July 13, 1990, the Alabama Legislature ratified Amendment No. 509 to the Constitution of Alabama of 1901. The Amendment declares that "English is the official language of the state of Alabama." After the ratification of the Amendment, the defendants promulgated new "English-only" rules regarding the administration of driver's license examinations.

11. The English-only rules require that all parts of the driver's license examination—the vision, written, oral, and driving skills examinations—be administered in English. The rules prohibit the use of translators as well as the use of interpretive aids, such as translation dictionaries.

12. The defendants' English-only driver's license rules deprive non-English speaking residents of this state of the opportunity to obtain a driver's license and unnecessarily impose tremendous hardships upon them solely on the basis of their national origin.

13. Plaintiff Martha Sandoval is a legal immigrant from Mexico. She speaks and reads Spanish fluently, but has limited English proficiency.

14. In September 1996, Ms. Sandoval attempted to obtain a driver's license in Mobil County. Because she could not understand English, she was unable to take the visual or written examinations required of all applicants. If the tests had been administered in Spanish or if Ms. Sandoval had been

allowed to use an interpreter, she would have been able to complete the application process and obtain a driver's license.

15. Without a driver's license, Ms. Sandoval suffers great hardship in her daily life. Ms. Sandoval maintains two jobs as a housekeeper. Because she cannot legally drive, Ms. Sandoval often is forced to walk almost two hours to and from work. The stress and strain of walking to and from work causes Ms. Sandoval to suffer chronic pain.

16. Ms. Sandoval has two young children, ages thirteen and six. On several occasions, she and her children have had medical emergencies that required medication or a doctor's care. Without the ability to drive, Ms. Sandoval had no means of obtaining medical care for herself or her children. On those occasions, she and her children had to wait several hours until her husband or a family friend could arrive to transport them to a doctor.

17. Defendants' refusal to administer the driver's license examination in languages other than English or, in the alternative, to allow non-English speaking applicants to utilize translators or interpretive aids, has the purpose and effect of subjecting the plaintiff and others similarly situated to discrimination on the basis of their national origin.

18. Defendants' policy is not narrowly tailored to achieve any compelling state interest.

19. Defendants' policy is not rationally related to any legitimate state interest.

20. Other states routinely administer driver's license examinations in languages other then English or allow non-English speaking applicants to use translators or interpretive aids.

21. Defendants have acted and continue to act under color of state law.

22. Plaintiff does not have an adequate remedy at law.

CLAIMS FOR RELIEF

Claims Against Defendant Hagan

23. Defendant's English-only driver's license rules discriminate against the plaintiff and other persons similarly situated on the basis of their national origin in violation of the Fourteenth Amendment to the United States Constitution. The violation may be remedied pursuant to 42 U.S.C.§ 1983.

24. Defendant's English-only driver's license rules deprive the plaintiff and other persons similarly situated of the equal benefit of the laws of the state of Alabama and of the equal right to licenses of every kind in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

Claim Against Defendant Department of Public Safety

25. Defendant's English-only driver's license rules have the purpose and effect of subjecting the plaintiff and other persons similarly situated to discrimination on the basis of national origin by an agency receiving federal financial assistance in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C.§ 2000d, and its implementing regulations, 42 C.F.R.§ 42.104(b)(1) and (2) (1996).

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays that the Honorable Court grant the following relief:

1. Certify the plaintiff class in this action;

2. Declare unconstitutional and unlawful Alabama's English-only driver's license rules;

3. Enter a permanent injunction requiring the defendants, their agents, employees, and all persons acting in concert with them to cease their unconstitutional and unlawful practices;

4. Award plaintiff's reasonable costs and attorneys' fees; and

5. Grant plaintiff such other relief as the Court deems necessary and just.

Respectfully submitted,

/s/ Rhonda Brownstein
Rhonda Brownstein
J. Richard Cohen
Ellen Bowden
Marcia Bull
Southern Poverty Law Center
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Post Office Box 2087
Montgomery, AL 36102-2087
(334) 264-0286

[Filed Jan. 21, 1997]

THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MARTHA SANDOVAL, individually and on behalf of all other similarly situated,	)	
Plaintiff,	)	
v.	)	**CV-96-D-1875-N**
L.N. HAGAN, in his official capacity as Director of the Alabama Department of Public Safety,	)	
and	)	
ALABAMA DEPARTMENT OF PUBLIC SAFETY,	)	
Defendants.	)	

ANSWER

L. N. Hagan, in his official capacity as Director, Alabama Department of Public Safety, and the Alabama Department of Public Safety (collectively "Hagan" unless otherwise stated), defendants in this action, make the following Answer to the Complaint filed by plaintiff Sandoval.

SPECIFIC RESPONSES

1. With respect to the allegations of Paragraph 1, Hagan states that no response is required as to the first two sentences. Hagan denies the allegations in sentences 3 and 4. Hagan specifically denies any allegation, express or implied, that the challenged English only rule results in discrimination on the basis of national origin.

2. Paragraph 2 is a jurisdictional allegation as to which no response is required.

3. Paragraph 3 is a jurisdictional allegation as to which no response is required.

4. Hagan lacks knowledge sufficient to admit or deny the allegations of paragraph 4, and denies them on that basis.

5. Hagan admits the allegations of paragraph 5.

6. Hagan admits the allegations of the first sentence of paragraph 6. Hagan denies that any financial assistance provided by the Department of Justice provides the basis for any claim by plaintiff.

7. Hagan denies that class action treatment of this case is appropriate and further denies the plaintiff is an appropriate class representative.

8. Hagan denies the allegations of paragraph 8.

9. Hagan admits the allegations of paragraph 9. Hagan states further that the Sate of Alabama's interest in the safety of its roads and highways is a legitimate and state interest, and its regulation of the issuance of drivers' licenses is a legitimate exercise of state power.

10. Hagan admits the allegations of paragraph 10. Hagan states further that Amendment No. 509 was submitted to the voters and approved by an overwhelming margin.

11. Hagan admits the allegations of paragraph 11.

12. Hagan denies the allegations of paragraph 12. In addition, Hagan specifically denies that the challenged English-only rule results in discrimination on the basis of national origin.

13. Hagan lacks knowledge sufficient to admit or deny the allegations of paragraph 13 and denies them on that basis.

14. Hagan lacks knowledge sufficient to admit or deny the allegations of paragraph 14 and denies them on that basis.

15. Hagan lacks knowledge sufficient to admit or deny the allegations of paragraph 15 and denies them on that basis.

16. Hagan lacks knowledge sufficient to admit or deny the allegations of paragraph 16 and denies them on that basis.

17. Hagan denies the allegations of paragraph 17. In particular, Hagan specifically denies that the challenged English-only rule results in discrimination on the basis of national origin.

18. Hagan denies the allegations of paragraph 18.

19. Hagan denies the allegations of paragraph 19.

20. Hagan lacks knowledge sufficient to admit or deny the allegations of paragraph 20 and denies them on that basis.

21. Hagan admits the allegations of paragraph 21.

22. Hagan denies the allegations of paragraph 22.

23. Hagan denies the allegations of paragraph 23. In particular, Hagan denies that the challenged English-only rule results in discrimination on the basis of national origin.

24. Hagan denies the allegations of paragraph 24.

25. The Department denies the allegations of paragraph 25.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

Plaintiff has failed to join indispensable parties.

SECOND DEFENSE

Plaintiff is not an appropriate class representative.

THIRD DEFENSE

This case is not appropriate for class action treatment.

FOURTH DEFENSE

The Alabama "English Only" Amendment and the Department's implementation of that amendment do not result in discrimination on the basis of national origin.

FIFTH DEFENSE

The Alabama "English Only" Amendment and the Department's implementation of that amendment are rationally related to furthering a legitimate state interest.

SIXTH DEFENSE

Plaintiff lacks standing to complain about the denial of any license other than a standard, non-commercial driver's license.

SEVENTH DEFENSE

Driving is a privilege, not a fundamental right.

EIGHTH DEFENSE

Plaintiff is not entitled to injunctive relief.

NINTH DEFENSE

The balance of equities does not favor plaintiff.

TENTH DEFENSE

Any claim under § 1981 is due to be denied because § 1983 is the sole remedy for claims against state actors.

ELEVENTH DEFENSE

Plaintiff is not a proper plaintiff with respect to 42 U.S.C. § 2000d.

TWELFTH DEFENSE

42 U.S.C. § 2000d does not provide a basis for any claim by plaintiff.

THIRTEENTH DEFENSE

Compensatory damages cannot be recovered under 42 U.S.C. § 2000d.

FOURTEENTH DEFENSE

Hagan is entitled to qualified immunity from any potential claim against him in his individual capacity.

FIFTEENTH DEFENSE

The Eleventh Amendment to the United States Constitution bars any potential claim for damages.

Respectfully Submitted

/s/ Robert E. Morrow by JJP
Robert E. Morrow

Of Counsel:
Alabama Department of Public Safety
Legal Unit
P.O. Box 1511
Montgomery, AL 36102-1511
(334) 242-4392

/s/ John J. Park Jr.
John J. Park, Jr.
Deputy Attorney General

Of Counsel:
Office of the Attorney General:
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Montgomery, AL 36104
(334) 242-7401

[Received June 5, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARTHA SANDOVAL,	)	
individually and on behalf of all	)	
others similarly situated,	)	
Plaintiff,	)	
	)	**Case No.**
vs.	)	**CV-96-D-1875-N**
	)	
L.N. HAGAN, et al.,	)	
Defendants.	)	

AMENDED ANSWER

L.N. Hagan, Director of the Alabama Department of Public Safety in his official capacity, and the Alabama Department of Public Safety hereby amend their Answer to state the following additional affirmative defense:

SIXTEENTH DEFENSE

Plaintiff lacks standing to assert a claim based on the alleged violation of the terms of any federal grant.

Respectfully submitted,

BILL PRYOR
ATTORNEY GENERAL
BY:

/s/ John J. Park Jr.
John J. Park, Jr.
Deputy Attorney General
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(334)242-4891 (fax)

/s/ Robert E. Morrow by JJP
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[Filed Oct. 17, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARTHA SANDOVAL, Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 96-D-1875-N
L. N. HAGAN, et al., Defendants.	)	

ORDER

There being no objections filed to the Recommendation of the Magistrate Judge filed herein on September 3, 1997, said Recommendation is hereby adopted, and it is the

ORDER, JUDGMENT and DECREE of the court that the motion to certify class is GRANTED and that the named plaintiff is CERTIFIED as the representative of the class of all legal residents of the State of Alabama who are otherwise qualified to obtain a Class D private vehicle driver's license but cannot do so because they are not sufficiently fluent in English.

Done this 17th day of October, 1997.

/s/ Ira DeMent
UNITED STATES DISTRICT JUDGE

[Received Dec. 11, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
vs.	)	**Case No. CV-96-D-1875-N**
L.N. HAGAN, et al.,	)	
Defendants.	)	

PRETRIAL STIPULATIONS

1. On July 13, 1990, Amendment 509 to the Alabama Constitution was proclaimed ratified.

2. Amendment 509 states, in part, "English is the official language of the state of Alabama."

3. Prior to the ratification of Amendment 509, and for some time afterwards, the Alabama Department of Public Safety administered the written portion of the driver's license examination in languages other than English.

4. In 1997, the Department located copies of the written examination in 14 different languages.

5. Some time after the ratification of Amendment 509, the Alabama Department of Public Safety stopped giving the written examinations in languages other than English.

6. By letter dated July 22, 1992, COL Ned W. McHenry, then the Director of the Alabama Department of Public

Safety asked the Attorney General whether Amendment 509 to the Alabama Constitution prohibits the Department of Public Safety from giving driver license tests in any language other than English.

7. In Opinion 92-411, dated September 15, 1992, the Attorney General advised COL McHenry that all persons applying for a driver's license should be required to take their licensing test in English.

8. The Department of Public Safety administers the written portion of the licensing examination to deaf persons who are unable to read and write through a videotape of the examination being signed.

9. The Department of Public Safety administers the written portion of the licensing examination to persons who speak English and cannot read or write by reading the examination to them or by use of a audiotape. If the examination is read to an applicant, a Department of Public Safety employee does the reading.

10. In 1997, the Department of Public Safety is on track to administer more than 300,000 driver license examinations.

11. In 1996, the Department of Public Safety administered 343,896 examinations, 88,204 of which were not passed.

AGREED TO this 11th day of December 1997.

/s/ Rhonda Brownstein	/s/ John J. Park Jr.
Rhonda Brownstein	John J. Park, Jr.
One of the Attorneys for the Sandoval Plaintiff Class	One of the Attorneys for L.N. Hagan and the Alabama Department of Public Safety

[Filed Feb. 12, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
vs.	)	
L.N. HAGAN, et al.	)	Case No. CV-96-D-1875-N
Defendants.	)	

ORDER ON PRETRIAL HEARING

A pretrial hearing was held in this case on December 17, 1997, wherein the following proceedings were held and actions taken:

1. PARTIES AND TRIAL COUNSEL:

For Plaintiffs: J. Richard Cohen
Rhonda Brownstein
Marcia Bull Stadeker

For Defendants: John J. Park, Jr.
Robert E. Morrow

COUNSEL APPEARING AT PRETRIAL HEARING: Same.

2. JURISDICTION AND VENUE:

Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1343. Venue is proper in the Middle District of Alabama, given that the Defendants reside here. 28 U.S.C. § 1391.

3. PLEADINGS: The following pleadings and amendments were allowed:

a. Complaint was filed December 31, 1996.

b. Answer was filed January 21, 1997.

c. Amended answer was filed June 4, 1997.

d. Class certification was granted on October 17, 1997.

e. Defendants' motion for summary judgment was filed October 24, 1997.

4. CONTENTIONS OF THE PARTIES:

(a) The Plaintiffs contend:

1. The Defendants' refusal to administer the Alabama driver's license examination in languages other than English or to allow for the use of translators or interpretive aids discriminates against the Plaintiffs on the basis of race or national origin in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Defendants' policy is subject to intermediate scrutiny review. Even if the policy is subject to rational basis review, as the Defendants contend, the policy fails given that is not rationally related to any legitimate state interest.

2. The Defendants' English-only policy deprives the Plaintiffs of the equal benefit of the laws and of the equal right to licenses of every kind on the basis

of their ethnic or ancestral characteristics in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

3. The Defendants' English-only policy violates Title VI of the Civil Rights Act of 1964 because it has an unjustified disparate impact on the basis of national origin. Under the regulations implementing Title VI, the Plaintiffs are not required to prove intentional discrimination. The Plaintiffs have a direct cause of action under Title VI and its implementing regulations. The Defendants receive federal financial assistance from the Department of Justice and the Department of Transportation.

(b) The Defendants contend that:

1. The practice of giving driver's license examinations only in English classifies on the basis of language, not national origin. In addition, a driver's license is a privilege, not a fundamental right.

2. Intermediate scrutiny is inapplicable to the Plaintiffs' Equal Protection claim. Under rational basis review, the policy should be upheld because it is rationally related to a number of legitimate state interests.

3. The Plaintiffs' discrimination claims are on the basis of national origin, which is not cognizable under § 1981.

4. The Defendants' policy has no disparate impact, much less an impact on the basis of national origin. Any classification is made on the basis of language, not national origin. In addition, the Plaintiffs lack standing, a private right of action, or both, to bring this claim under Title VI.

5. STIPULATIONS BY AND BETWEEN THE PARTIES:

Stipulations will be filed on December 11, 1997.

6. A trial docket will be mailed to counsel approximately one month prior to the trial term.

It is ORDERED as follows:

(1) The non-jury trial, which is to last three days, is set at 10:00 A.M. on the 17th day of February, 1998, in Montgomery, AL.

(2) All understandings, agreements, and stipulations contained in this pretrial order shall be binding on all parties unless that Order be hereafter modified by order of the court.

DONE this 12th day of February, 1998.

/s/ Ira DeMent
UNITED STATES DISTRICT JUDGE

[Received Mar. 5, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARTHA SANDOVAL, individually and on behalf of all others similarly situated, Plaintiff,	)	
vs.	)	Case No. CV-96-D-1875-N
L.N. HAGAN, et al., Defendants.	)	

AMENDMENT TO THE COMPLAINT

Paragraph 25 of the Complaint and the heading to that paragraph reads as follows:

Claim Against Defendant Department of Public Safety

25. Defendant's English-only driver's license rules have the purpose and effect of subjecting the plaintiff and other persons similarly situated to discrimination on the basis of national origin by an agency receiving federal financial assistance in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulations, 42 C.F.R. § 42.104(b)(1) and (2) (1996).

Plaintiffs hereby amends paragraph 25 and its heading to read as follows:

Claim Against Defendant Department of Public Safety and Defendant Hagan

25. Defendants' English-only driver's license rules have the purpose and effect of subjecting the plaintiff and other persons similarly situated to discrimination on the basis of national origin by an agency receiving federal financial assistance in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and its implementing regulations, 42 C.F.R. § 42.104(b)(1) and (2) (1996).

Respectfully submitted,

/s/ J. Richard Cohen

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Montgomery, Alabama 36104

Attorneys for Plaintiffs

OFFICE OF THE ATTORNEY GENERAL
92-00411

JIMMY EVANS
ATTORNEY GENERAL
STATE OF ALABAMA
Sep 15 1992

Honorable Ned W. McHenry
Department of Public Safety
Post Office Box 1511
Montgomery, Alabama 36102-1511

Drivers License - Tests and Testing

All persons applying for a driver's license should be required to take their licensing test in English.

Dear Mr. McHenry:

This opinion is issued in response to your request for an opinion from the Attorney General.

QUESTION

Does Amendment 509 to the Constitution of the State of Alabama of 1901 prohibit the Department of Public Safety from giving driver license tests in any language other than English?

FACTS AND ANALYSIS

Amendment No. 509 to the Constitution of Alabama of 1901 provides as follows:

"English is the official language of the state of Alabama. The legislature shall enforce this amendment by

appropriate legislation. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama.

"Any person who is a resident of or doing business in the state of Alabama shall have standing to sue the state of Alabama to enforce this amendment, and the courts of record of the state of Alabama shall have jurisdiction to hear cases brought to enforce this provision. The legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this amendment."

This amendment requires all officials of the state of Alabama to take all steps necessary to insure that the role of English as the common language of the State of Alabama is preserved and enhanced. Thus, to the extent possible, officials of this state should require the use of English in all state actions and programs.

While requiring an ability to understand English as a requirement to participate in some state programs might be a violation of Title VI of the Civil Rights Act of 1964, or the Equal Protection Clause of the Fourteenth Amendment[1], consideration of safety and the integrity of the licensing process would support a requirement that driver license examinations be given in English. Safety considerations would include the

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[1] It has been held that a public school district receiving federal financial assistance violates Title 6 of the Civil Rights Act of 1964 where the school system fails to establish a program to deal with the language problem of students of Chinese ancestry who do not speak English. *Lau v. Nichols*, 414 U.S. 563, 39 L.Ed.2d 1, 94 S.Ct. 786 (1974).

person's ability to read and understand highway signs and to understand the directions of law enforcement officers.

It would be practically impossible for the state to accommodate the wide variety of languages of persons applying for a license. To allow such persons to use their own interpreters would, of course, jeopardize the integrity of the test.

CONCLUSION

All persons applying for a driver's license should be required by the Director of the Department of Public Safety to take their licensing tests in English.

I hope this sufficiently answers your question. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS
Attorney General
By:

/s/ James R. Solomon, Jr.
JAMES R. SOLOMON, JR.
Chief, Opinions Division

JE/JC/cp
09620

					GRANT NUMBER	TOTAL RECEIPTS
					ERAD	$328,500.00
					ERAD/DCE/SP	$6,689.00
					DAF	$99,843.95
					DB-92-10-0010	$7,887.92
					DTNH22-92-Y-07019	$58,059.10
					94-03-BH315-01	$201,420.28
					95-03-BH315-01	$212,822.12
					MC-94-01(333)	$1,183.13
					DB-94-10-0003	$329,983.27
					DB-95-10-0005	$121,180.56
					MC-94-01(001)	$224,465.32
					MC-95-01(001)	$1,145,936.94
					94-03-PT315-17	$997.98
					HB-94-10-06	$46,452.63
					94-03-PT315-16	$606.00
					SE-ALM-012	$7,658.71
					SE-ALS-014	$784.35

	RECEIPTS FOR FUNDS 302/303/304/305/308
	BY GRANT
	PUBLIC SAFETY - FEDERAL GRANTS SUMMARY
	OCTOBER 1, 1995 THRU SEPTEMBER 30, 1996
FUND NUMBER	GRANT NAME
302	ERADICATION
	DOMESTIC CANNABIS ERAD/SUPP PROGRAM
303	DRUG ASSET FOREITURE
304	VIOLENT CRIME TASK FORCE
	FATAL ACCIDENT REPORTING SYSTEM
	MAXIMUM SPEED ENFORCEMENT
	MAXIMUM SPEED ENFORCEMENT
	MCSAP GRID PADS
	ALABAMA MAJOR DRUG TASK FORCE
	ALABAMA MAJOR DRUG TASK FORCE
	MOTOR CARRIER ASSISTANCE PROGRAM
	MOTOR CARRIER SAFETY ASSISTANCE PROGRAM
	STEP WORKSHOP
	STEP
	HANDS ACROSS THE BORDER
	ORG. CRIME DRUG ENFORCEMENT TASK FORCE
	ORG. CRIME DRUG ENFORCEMENT TASK FORCE

FUND NUMBER	GRANT NAME	GRANT NUMBER	TOTAL RECEIPTS
	NGA COMM VEH DATA ELEMENTS ACC REP/MAN REV	MC-94-01(888)	$23,556.96
	PEN-BASE TECHNICAL WORK GROUP	MC-94-01-555	$3,198.24
	DRUG ENFORCEMENT ADMINISTRATION	DEA	$24,007.57
	NATIONAL DRIVER REGISTER PDPS	DTNH22-91-Z-05033	$127,846.39
	ABI HOSTAGE NEGOTIATION TEAMS	DB-92-10-0011	$28,770.00
	UNITED STATES CUSTOMS	USC	$4,821.52
	VIOLENT CRIME	VC/FBI	$2,768.68
	OHTS WORKSHOPS AND SEMINARS	95-03-PT315-15	$1,779.19
	VIOLENT OFFENDER COMPOSITE PROGRAM	DB-93-10-0014	$7,466.25
	ADECA	PED-95-CSS-44	$100,000.00
	ALABAMA DEPARTMENT OF TRANSPORTATION	ADOT	$10,000.00
305	GRANT/DAF	GRANT	$238,720.94
308	ALABAMA PEASE OFFICERS STANDARD COMMISSION	POST	$150,638.30
GRAND TOTAL SUMMARY			$3,518,045.40

IN THE SUPREME COURT
OF THE UNITED STATES

[Caption Omitted in Printing]

Order Granting Petition for a Writ of Certiorari entered on September 26, 2000.

No. 99-1908

IN THE

Supreme Court of the United States

JAMES ALEXANDER, *in his official capacity as the Director of the Alabama Department of Public Safety*, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,
Petitioners,

v.

MARTHA SANDOVAL,
Individually and on Behalf of All Others Similarly Situated,
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONERS

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JOHN J. PARK, JR.
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Counsel for Petitioners

QUESTION PRESENTED

In enacting Title VI of the Civil Rights Act of 1964 under its Spending Clause powers, did Congress authorize individuals to bring private rights of action against States under disparate-impact regulations promulgated by federal agencies?

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JURISDICTION

The court of appeals entered its judgment on February 29, 2000. Petitioners filed their petition for writ of certiorari on May 30, 2000. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8 of the United States Constitution provides in part:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

U.S. Const. art. I, § 8.

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

42 U.S.C. § 2000d.

Section 602 of Title VI provides:

> "Each Federal department and agency which is empowered to extend federal financial assistance to any program or activity, by way of grant, loan, or contract

other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1.

The relevant regulation of the Department of Justice reads as follows:

"A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of persons to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or other methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin."

28 C.F.R. § 42.104(b)(2).

STATEMENT

Just as all litigants presume that they must present their arguments to the Court in English, so the state and federal governments have long presumed that they may impose an assortment of English-fluency requirements on the privilege of participating in other governmental and private functions. Be it the privilege of obtaining a driver's license, a pilot's license, or a boating license, or indeed the privilege of becoming a citizen of the United States at all, the state and federal governments traditionally have conditioned these benefits on proficiency in a common language. In claiming that adherence to this tradition in the context of an English-proficiency requirement for obtaining a driver's license violates a disparate-impact regulation promulgated by federal agencies under Title VI of the Civil Rights of 1964, the Eleventh Circuit mistook a pragmatic exercise of the local police power for an act of discrimination.

More fundamentally, the decision to imply a private cause of action against a State on the basis of an administrative regulation fails to respect the independent role of the States in the National Government. In establishing a system of "dual sovereignty" to divide and disperse governmental power, (*Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)), the Constitution gives the state and federal governments broad latitude to supervise their own employees and to advance the police-power objectives of their own regulatory programs. The preservation of these dual lines of authority and accountability, however, precludes one sovereign from casually regulating the other. States for example may not regulate the sovereign activities of the federal government at all, whether by legislation or agency rules. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). And much as an uncabined state authority to regulate the national government would establish a "power to destroy" its independence in the federal scheme, *id.* at 431, the Constitution's structural safeguards place limitations on when and how Congress may regulate state functions, *see Gregory*, 501 U.S. at 459 ("'Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.'") (quoting The Federalist No. 28, at 180-81 (Clinton Rossiter ed., 1961)).

To preserve this delicate federal-state balance and to ensure that "power" remains always "the rival of power," the Constitution carefully circumscribes Congress's authority to bend state sovereignty to its will. Just three sources of constitutional power exist for regulating state functions—the Commerce Clause, the Fourteenth Amendment, the Spending Clause—and each invocation of power must adhere to carefully-prescribed limitations on its exercise. Here, for example, Congress invoked the Spending Clause, which generally allows it to condition federal funding on a State's waiver of constitutional immunity as well as on a State's

willingness to implement a federal regulatory program that Congress could not otherwise directly command it to enforce. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). In exercising this unique power, however, the National Legislature must adhere to its end of the procedural bargain. It must give an "unmistakably clear" textual warning of what these federal conditions are and of how they will be enforced. *Id. See South Dakota v. Dole*, 483 U.S. 203 (1987).

In this instance, the Court faces an exercise of Spending-Clause authority that conspicuously fails to respect these protocols. The claim assumes that a federal agency may establish a disparate-effect test by regulation, even though Congress has not done so by statute. The claim assumes that an individual may enforce this regulation, even though neither the statute nor regulation offers any hint that this was intended. The claim assumes that this disparate-effect regulation may eliminate an English-proficiency requirement, even though this Court has never equated such laws with discrimination on the basis of national origin. And the claim assumes that Congress may silently ban this everyday exercise of the state police power, even though the Federal Government itself has many similar requirements, if not far more of them than the State of Alabama has.

This sweeping innovation proves not just the lack of merit to respondent's claim, but also illustrates the long-term risk of failing to adhere to the Court's political-process limitations on the exercise of federal power. States like the federal government are not ordinary civil defendants. When Congress wishes to regulate the States, it thus must respect an "etiquette of federalism," *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring, joined by O'Connor, J.), including the inter-branch imperative that Congress (not a federal agency) speak directly and clearly before it decides to upset the constitutional equilibrium between state and federal power. Yet the serial implications and inferences required to

sustain this assumption of regulatory authority confirm the degree to which this claim fails to respect that etiquette and, with it, the States' sovereign status in the federal system.

A. The English-Proficiency Requirement.

In 1990, the people of Alabama ratified an amendment to their Constitution. Under Amendment 509, they declared English "the official language of the state of Alabama," and required the legislature and government officials to take all steps necessary to ensure that "the role of English as the common language of the state of Alabama is preserved and enhanced." No one, including respondent, has challenged the validity of this amendment.

In the aftermath of this amendment and in accordance with its terms, the Alabama Department of Public Safety determined that it would no longer administer state driving-license examinations in any language other than English. Not only did this change comply with the requirements of Amendment 509 and not only did it avoid the demeaning assumption that adult residents of the State were unable to learn English when they put their mind to it, but it also had the virtue of advancing public safety. As the State explained at trial and as State law attests, the overriding police-power objective of testing applicants before giving them permission to drive is to ensure that they are capable of driving safely. *See* Ala. Code § 32-4-2; Trial Transcript (2/17-18/98) ("Tr.") at 312; Alabama's Memorandum in Support of Motion for Summary Judgment (10/24/97) ("Ala. Memo."), Ex. C, ¶ 8 and Ex. D, ¶ 11. An ability to understand road signs, together with an ability to communicate with law enforcement and medical personnel, all support requiring Alabama drivers to be fluent in English. Joint Appendix ("J.A.") at 29-30. A contrary approach, it was also determined, was difficult to administer. An endless number of potential languages exist in which applicants may wish to be tested, and the State has finite resources when it comes to administering such a broad array of tests. Tr. 312-14; J.A. at

30; *cf.* Tr. 253-54. Because none of the Department's employees is fluent in a foreign language, the Department itself also cannot monitor foreign language examinations and any translations of examinations accordingly must come from outside the Department, which is time consuming, potentially expensive and fraught with risks to the integrity of the examination. Tr. 276, 281, 312-14; *see* Ala. Memo. at Ex. D, ¶¶ 6 & 9; *cf.* Tr. 252-54. The State, lastly, found it difficult to identify a principled way for offering examinations in some languages but not in others. J.A. at 30.

B. The Federal Government's English-Proficiency Requirements.

Alabama is not alone in promoting English fluency. The United States also has many laws, programs and jobs that require proficiency in English. These requirements start with the question of who may and who may not become a citizen of the United States, continue with the language of the United States Code, and extend to innumerable other areas as well. The federal government requires those seeking naturalization to have "an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language." 8 U.S.C. § 1423(a). The federal government also requires those wishing to sit as federal jurors to be able "to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form" and to be able "to speak the English language." 28 U.S.C. § 1865(b). This Court's rules also require any record "material written in a foreign language" to be translated into English. *See* Sup. Ct. R. 31.

When it comes to the types of transportation-safety issues presented in this case, the federal government has adopted several other like-minded requirements. Under its licensing requirements for commercial motor carrier vehicle drivers, the United States Department of Transportation provides that "[a] person is qualified to drive a motor vehicle if" he or she "[c]an

read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records." 49 C.F.R. § 391.11(b). To qualify as an "able seaman" on a United States vessel, the applicant must "[s]peak and understand the English language as would be required in performing the general duties of able seaman and during an emergency aboard ship." 46 C.F.R. § 12.05-3(a). And all pilots, whether recreational or commercial, must "[b]e able to read, speak, write and understand the English language." 14 C.F.R. § 61.83 (student pilot); 14 C.F.R. § 61.96(b) (recreational pilot); 14 C.F.R. § 61.103 (private pilot); 14 C.F.R. § 61.123 (commercial pilot); 14 C.F.R. § 61.153 (airline transport pilot); 14 C.F.R. § 61.183 (flight instructor). The same is true of flight engineers, 14 C.F.R. § 63.31, flight navigators, 14 C.F.R. § 63.51, and air traffic controllers, 14 C.F.R. § 65.33.

The national government also has several programs designed to promote English proficiency. It thus (1) provides funding for "adult education" "to help individuals of limited English proficiency achieve competence in the English language," including proficiency in "speaking, reading, writing, or understanding the English language," 20 U.S.C. §§ 9202(1), (6) & (10); (2) provides funding for "special alternative instructional program[s]" that "utilize[] specially designed English language curricula and services but do[] not use the student's native language for instructional purposes," a program designed to "enable[] limited English proficient students to achieve English proficiency," 20 U.S.C. §§ 7601(15)(A) & (B); (3) provides vocational funding to States that "[p]rovide assurances" that they will "assist[] students . . . of limited English proficiency . . . to succeed through supportive services such as . . . English-language instruction," 34 C.F.R. § 403.190; (4) and provides funding to Indian Tribes "to coordinate the provision of any needed

special services for conditions such as disabilities and English language skill deficiencies." 20 U.S.C. § 7835(a)(4)(B).

C. State English-Language Requirements.

All States have joined Alabama and the United States in one way or another in establishing English-language requirements. *See* Appendix. Many States for example have constitutional and statutory provisions making English the official language of the State. *See, e.g.,* Alaska Stat. § 44-12.310; Ariz. Const. art. 28, § 1; Cal. Const. art. 3, § 6; Colo. Const. art. 2, § 30a. And the number of state laws requiring English proficiency or its use in official communications is anything but discrete. Product-labeling requirements, articles of incorporation, licensing requirements for veterinarians, pharmacists, physical therapists and professional counselors, official government communications and filings, loan terms, jury qualifications, eligibility for state office or the state legislature, the records of scrap-metal dealers and podiatry examinations, among countless others, all require the use of English or proficiency in the language. *See* Appendix.

D. Alabama's Programs for Teaching English Proficiency.

Individuals who live in Alabama have access to a host of private and public initiatives designed to teach proficiency in the English language. First and foremost, the State guarantees a free public education to all of its residents, whether they were born in this country or not, whether English is their first language or not. This primary and secondary education gives most residents of Alabama an equal opportunity to become proficient in English long before eligibility for a driving-license examination becomes a relevant issue in their lives. *See* Art. XIV, § 256, Alabama Constitution of 1901; *Alabama Coalition for Equity v. Hunt*, 1993 WL 204083 (Ala. Cir. Ct. 1993); *see also, Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993). The State has several remedial programs, some in

partnership with the federal government and some not, that offer adults an opportunity to develop fluency in English. These include programs at public colleges and universities that offer courses in English as a second language. *See* http://www.usouthal.edu/usa/secondlang/index.html (University of South Alabama—English Language Center); http://www.auburn.edu/esl (Auburn Univ.—English as Second Language; with community programs at /community.html); http://www.ua.edu/academic/intenational/eli (University of Alabama English Language Institute). And several privately-sponsored programs offer courses in English as a Second Language, and again do so at little to no cost to the student. Tr. 20, 33-34, 55-56, 133-34, 144. Access to these English-language programs is available to all Alabama residents, including those residents who live in Mobile where respondent has chosen to live. *Id.*

E. The Federal Spending Program.

Alabama participates in a host of cooperative spending programs with the federal government. Through these programs, Alabama receives millions of dollars each year in federal grant funds from a diverse group of federal agencies.

At issue here are several grants that Alabama receives from the United States Department of Transportation and Department of Justice. These federal monies support several specific public-safety objectives, from the eradication of marijuana to road-construction projects to highway beautification. J.A. at 31-32. None of these federal grants, however, is earmarked for the proper licensing of drivers in general or the licensing examinations that such drivers should receive in particular. Tr. 5. The most closely related grant to the issues raised here was made by the United States Department of Transportation, National Highway Traffic Safety Administration, for the purpose of helping Alabama make the "necessary data processing and procedure modifications to their driver licensing system" to permit

Alabama to participate in the National Driver Register system. State's Memorandum in Support of Motion for Summary Judgment (10/24/97), Ex. I. That system links all state driver-licensing databanks to improve state procedures for identifying high-risk applicants who should be denied licenses. *Id.* While this grant does not address the testing of applicants for driving licenses, it does include an obligation to "comply with all Federal statutes relating to nondiscrimination," including "Title VI of the Civil Rights Act of 1964 (P. L. 88-352) which prohibits discrimination on the basis of race, color, or national origin." *Id.* This compliance provision does not make any reference to regulations promulgated under Title VI.

In contrast, a grant from the Federal Highway Administration to support a motor carrier assistance program included the condition that the Alabama Department of Public Safety not only comply with Title VI but also with

> related nondiscrimination statutes, and applicable regulatory requirements to the end that no person in the United States shall, on the grounds of race, color, national origin, sex, handicap or age, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity for which the applicant/recipient receives Federal financial assistance. The specific requirements of the United States Department of Transportation standard Civil Rights assurances with respect to the States' highway safety programs (required by 29 C.F.R. 21.7 and on file with the U.S. DOT) are incorporated in this grant agreement.

Plaintiffs' Opposition to Motion for Summary Judgment (11/25/97), Ex. 27. This grant in other words sought compliance both with Title VI and with "related nondiscrimination statutes and applicable regulatory requirements" and did so with respect to "any program or activity for which the applicant/recipient receives Federal financial assistance." Neither the grant nor the applicable

regulations, however, say that the regulations may be enforced by private individuals against States in federal court.

To date, no agency of the federal government has sought to enforce Title VI, its regulations or any other federal "nondiscrimination" statute against the Alabama Department of Public Safety with regard to its practice of giving driving-license examinations in English. Whether it be the federal grant for the National Driver Register system, the grant for the motor carrier public system or any other grant, the federal government has yet to ask Alabama voluntarily to abandon this testing system or to do so as a condition of receiving future federal funds.

F. Title VI.

Enacted as part of the Civil Rights Act of 1964, Title VI contains two relevant sections. Section 601 sets forth and defines the Title's anti-discrimination provision. It says that State recipients of federal funding may not "discriminat[e]" against persons "on the ground of race, color, or national origin" or "exclude[] from participation in" or "den[y] the benefits of" any federally-funded program on these grounds.

Section 602 is an implementation provision, and contains three essential parts. The first section delegates to federal agencies rulemaking authority to "effectuate" Section 601. 42 U.S.C. § 2000d-1. The second provision sets forth agency guidelines for obtaining compliance with section 601. It says that "[c]ompliance" may be effected (1) by "termination" of funding or (2) "by any other means authorized by law." *Id.* The third section establishes a procedural rule for determining non-compliance, including notice to the state agency, a requirement that the federal agency seek compliance initially by voluntary means, a reporting mechanism for alerting Congress that a federal agency is considering the termination of federal funding, and a 30-day delay between the time notice is given to Congress of an agency-enforcement decision and the

implementation of that decision. *Id.* By their terms, neither Section 601 nor Section 602 provides for independent private-party enforcement actions against States for regulatory violations.

In implementing Title VI, the Departments of Justice and Transportation have promulgated a variety of rules under Title VI. The Department of Justice rule that respondents have invoked here says that a "recipient . . . may not . . . utilize criteria . . . which have the effect of subjecting persons to discrimination because of their race, color, or national origin." 28 C.F.R. § 42.104(b)(2); J.A. at 10. The Department of Transportation has a similar rule. 49 C.F.R. § 21.1. Neither of these disparate-impact rules nor any other empowers private individuals to enforce the regulations by suits against States in federal court.

G. Proceedings Below.

On December 31, 1996, Martha Sandoval filed a class action on behalf of herself and other similarly-situated individuals against the Alabama Department of Public Safety and its then-Director, L. N. Hagan, in his official capacity. She alleged that the Department's English-proficiency requirement for taking a driving-license examination violated her right to be free from discrimination on the basis of national origin, a right that she claimed was secured by 42 U.S.C. § 1981, 42 U.S.C. § 1983, the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq*, and one of Title VI's implementing regulations, 42 C.F.R. §§ 42.104(b)(1) and (2) (1996). In doing so, she sought a judgment declaring that the Department's practice was unlawful and an injunction prohibiting the Department from continuing to give driving-license examinations only in English. *See* J. A. at 10.

The district court certified a plaintiff class consisting of "all legal residents of the State of Alabama who are otherwise

qualified to obtain a class D private vehicle driver's license but cannot do so because they are not sufficiently fluent in English." J. A. at 19. Following a trial, the district court granted the requested declaratory and injunctive relief. "The following factors," the court indicated, "lead"

> to the finding that a private right of action may be brought pursuant to regulations enacted pursuant to § 2000d-1: (1) the implicit reasoning of the Supreme Court in *Guardians*, *Alexander*, and *Lau*; (2) the implicit reasoning of the Eleventh Circuit in *Elston* and *Georgia State Conference*; (3) the implicit reasoning of the Eleventh Circuit in *Doe* and *Harris* (Title VI in conjunction with the regulations); (4) the explicit reasoning of the Third Circuit in *Seif* and the reasoning of other courts that have addressed the issue, and (5) the Department's contractual guarantees.

Pet. App. at 117a. The district court also concluded that, "[a]lthough no court has explicitly held that language is a proxy for national origin," language could be equated with national origin through a disparate impact theory. Pet. App. at 158a. The court rejected the Section 1981 claim and did not reach the equal-protection claim.

The Eleventh Circuit affirmed. Recognizing that the Supreme Court "has yet to squarely answer the question" whether Title VI creates an implied cause of action for disparate-impact claims, Pet. App. at 42a, the Court started by looking at Section 601. "To state a Section 601 claim," the appellate court observed, "just like a claim arising under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must establish the funding recipient's discriminatory intent." Pet. App. at 34a. In addition, the court continued, Section 602 authorizes federal agencies to promulgate rules to "effectuate" Section 601. *Id.* Noting that the respective agencies had promulgated disparate-impact regulations under Section 602, the court framed the "central issue presented" as

whether private individuals "may enforce these agency regulations against [the State] absent any express statutory authorization." Pet. App. at 37a.

In holding that an "implied private cause of action" existed to enforce these regulations, the panel relied on four factors. First, it felt that circuit precedent supported this implied private right of action. Pet. App. at 37a-39a. Second, "the only other circuit to have addressed the issue in detail"—the Third Circuit—also found a private right of action based on "Title VI's legislative scheme and legislative history." Pet. App. at 41a.

Third, it thought that the Court's decisions in *Lau*, *Guardians*, and *Alexander*, though not "squarely" addressing the issue, "logically support[ed]" an "implied private cause of action" under Section 602 of Title VI. *Id.* at 42a. Although "*Lau* rested its holding under Section 601 of Title VI," the court of appeals concluded that its "reasoning" applied with equal force to claims under Section 602 of Title VI. *Id.* at 43a. *Guardians*, the court believed, was to the same effect: While it "did not explicitly address whether an implied private right of action existed under Section 602," the analysis of five of the Justices writing separately "strongly supports recognizing such a right." *Id.* at 44a. The court acknowledged that *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and *United States v. Fordice*, 505 U.S. 717 (1992), were inconsistent with the disparate-impact right of action that *Lau* seemed to permit. Nevertheless, it concluded that an aggregation of the "plurality members" of the Court in *Guardians* "strongly suggest[s] the existence of an implied private cause of action under Section 602," Pet. App. at 46a, and that *Fordice* would not have "overruled *Guardians* without any discussion of its precedent," *id.* at 47a n.24. Lastly, the court observed that "plaintiffs relied on Section 602 directly rather than basing their cause of action on Section 1983," and so were not in a position

to rely on that statute as a source of their cause of action. *Id.* at 45a n.21.

SUMMARY OF ARGUMENT

In holding that "Title VI creates a private implied cause of action" against States "to enforce the disparate impact regulations promulgated under Section 602," Pet. App. at 42a, the court of appeals committed reversible error. Language, context, bedrock Spending-Clause principles, and precedent all confirm that Congress at most empowered federal agencies, but not private individuals, to enforce these regulations against States in the context of generally-applicable English-proficiency requirements.

1. Title VI does not support this cause of action.

a. Two bookend principles frame the question presented, and go a long way toward answering it. In asking whether a private action exists, the "most important inquiry" is whether plaintiffs can meet their "burden" of demonstrating that "Congress intended to create the private remedy sought by" them in federal court. *Suter v. Artist M.*, 503 U.S. 347, 364 (1992). And in the context of an action against a State under Congress's Spending-Clause powers, this "most important inquiry" turns on whether Congress "unambiguously" created the private action, *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981), "in the language of the statute," *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1870 (2000).

b. The terms of Title VI do not create a disparate-impact test enforceable by private parties in federal court, to say nothing of doing so unambiguously. Section 601 bars "discrimination" "on the ground of race, color, or national origin," 42 U.S.C. § 2000d, a standard that covers only intentional-discrimination, not disparate-impact, claims. *See United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Nor

does Section 601 authorize private individuals, as opposed to the federal government, to enforce compliance with its requirements under agency regulations in the course of implementing cooperative Federal-State programs.

Section 602 is of no assistance either. It does not create any rights at all, but merely delegates rulemaking authority to federal agencies to "effectuate" the anti-discrimination provision of Section 601. This unremarkable grant of authority does not authorize executive-branch agencies to make impermissible by regulation what Congress has made permissible by statute. Nor does this grant of authority permit private enforcement of its terms. Section 602's carefully-prescribed rules for compelling "compliance" with Section 601 all mandate exactly the opposite conclusion. They compel initial notice to the State of non-compliance, an attempt to obtain voluntary compliance, an administrative hearing to establish non-compliance, notice to Congress of a desire to bring the State into compliance, and then and only then an agency termination of funding or an action by the Department of Justice to achieve compliance. A Congress so rigorous in its oversight of federal agencies would not silently empower private individuals to circumvent every one of these requirements through federal-court actions premised on rules passed by the very agencies Congress elsewhere was trying to monitor.

2. Neither *Chevron* deference, the implied right of action doctrine, *Lau*, nor *Guardians* leads to a contrary result.

a. Having failed to show that Sections 601 and 602 of Title VI establish a disparate-impact cause of action enforceable against States by private individuals, respondents may not rely on principles of *Chevron* deference to permit executive-branch agencies to create this cause of action on their own. The statutory ambiguity that triggers *Chevron* deference comes *after*, not *before*, the application of all pertinent rules of statutory construction, including the interpretive presumption

against the creation of private causes of action against States and including of course this Court's decisions that Section 601 does not cover disparate-impact claims. At any rate, the unambiguous statutory directive that *Pennhurst* requires precludes private enforcement of the ambiguity-prompted regulation that the Department of Justice claims authority to innovate. Otherwise, every clear-statement case the Court has ever decided stands just one ambiguity-clarifying regulation away from irrelevance. Lastly, even on its own terms, the disparate-impact regulation does not suffice to support this claim the State. It nowhere mentions and nowhere creates such a private right of action.

b. For many of the same common-sense reasons that *Chevron* regulations may not themselves satisfy the clear-statement rule, neither does the "implied" cause of action test announced in *Cort v. Ash*, 422 U.S. 66 (1975), satisfy this requirement. What *Cort* allows federal courts to do with statutory implications and inferences in actions against private entities, *Pennhurst* positively proscribes in actions against States under federal regulations.

Nor in any event can respondents shoulder the burden of meeting the four-part *Cort* test under this administration regulation. Far from creating a right in favor of individuals who do not speak English, Title VI merely bars the kind of intentional discrimination barred by the Fourteenth Amendment, which has never included the notion that English-language requirements represent a proxy for discrimination on the basis of national origin. Even then, moreover, the statute just imposes a "generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner" laid out by the statute. *Suter*, 503 U.S. at 363-64. No part of the legislative history indicates, or even hints, that Title VI was designed to bar generally-applicable English-fluency requirements, including those that the National Government itself has long embraced. *Cort*, 422 U.S. at 78. And if the

sovereign choice to use a common language in providing government services and to decide when and how to administer driving-license examinations do not represent the types of policy issues that are "traditionally relegated to state law," it is difficult to imagine what would meet this test. *Id.*

c. The Court's Title VI decisions do not support a contrary analysis. *Lau v. Nichols*, 414 U.S. 563, 566 (1974), relied "solely" on Section 601 and assumed that it barred disparate-effect, as well as intentional-discrimination, claims. Since then, the Court has made clear that Section 601 proscribes only what the Fourteenth Amendment proscribes, *see Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), a standard that does not cover disparate-impact claims. In *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), six members of the Court wrote separately, and agreed only on announcing a judgment that a lower-court decision *refusing to implicate* a Title VI private cause of action should be affirmed.

ARGUMENT

While the structural guarantees of the United States Constitution inform the resolution of this dispute, the case ultimately turns on a matter of statutory interpretation, not constitutional power. Alabama does not challenge Congress's authority to attach conditions to the receipt of federal funds. And it acknowledges that one of those conditions generally may be the requirement that States subject themselves to causes of action by private individuals for violations of germane federal requirements developed in connection with the spending program. The question here is whether the Federal Government established any such condition and whether it did so with respect to disparate-impact claims brought by third parties in federal court arising from generally-applicable English-language requirements. As the court of appeals recognized, this "Court has yet to squarely answer the

question." Pet. App. at 42a. And while that observation is accurate, the straightforward terms of the pertinent statutes and regulations, together with first principles of this Court's spending-power jurisprudence, all confirm that the court of appeals erred in further finding that an implied cause of action exists in this instance and under these regulations.

I. TITLE VI DOES NOT CREATE A PRIVATE CAUSE OF ACTION AGAINST STATES FOR DISPARATE-IMPACT VIOLATIONS ARISING FROM GENERALLY-APPLICABLE ENGLISH-PROFICIENCY REQUIREMENTS.

In determining whether Congress has created a private right of action against public or private litigants, the Court has consistently held that the "most important inquiry" is one of congressional will. *Suter v. Artist M.*, 503 U.S. 347, 364 (1992). Have plaintiffs satisfied their "burden" of proving that "Congress intended to create the private remedy sought by" them in federal court? *Id.* Absent this showing, it is clear, the Court "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981). *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("what must ultimately be determined is whether Congress intended to create the private remedy asserted").

In keeping "the focal point" on "Congress' intent in enacting the statute," *Thompson v. Thompson*, 484 U.S. 174, 179 (1988), the Court applies customary rules of statutory interpretation to ascertain congressional meaning. Here, the most pertinent of those rules stems from the nature of the action (an individual claim against a State) and the source of congressional power (the Spending Clause). In this setting, the Court has made clear that Congress must "unambiguously" create the cause of action, *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981), "in the language of the statute," *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1870 (2000). Congress, however, has done neither in this instance.

A. To Create A Private Cause of Action Against States in the Context of Spending-Clause Legislation, Congress's Intent Must Be "Unambiguously" Expressed in the Language of the Statute.

In enacting Title VI, Congress invoked its Spending Clause power. Under this authority "to . . . provide for the . . . general Welfare," U.S. Const. Art. I, § 8, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotation omitted). In exercising this power, neither Article I's "enumerated legislative fields," *id.* at 207 (internal quotation omitted), nor the "Tenth Amendment limitation on congressional regulation of state affairs," *id.* at 210, generally cabins the National Legislature's authority. Because "Congress may fix the terms on which it shall disburse federal money to the States," *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), it may deploy this authority to induce States to establish programs that it could not otherwise compel them to enact. *Cf., e.g., Printz v. United States*, 521 U.S. 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program."); *New York v. United States*, 505 U.S. 144, 178 (1992) ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.").

Yet the constitutional explanation for this sweeping grant of power defines its outer limits. Compliance with Spending-Clause legislation remains a matter of choice: "[T]he States are given the choice of complying with the conditions set forth in

the [legislation] or forgoing the benefits of federal funding." *Pennhurst*, 451 U.S. at 11. For this reason, the Court has recognized that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 17. The Court's description of Spending-Clause legislation as a contract establishes a useful metaphor for characterizing this lawmaking power and captures precisely the constitutional basis upon which Congress may use this authority to induce States indirectly to act in a manner that it could not require directly.

Because "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,'" *Pennhurst*, 451 U.S. at 17, the Supreme Court has repeatedly held that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation,'" *Dole*, 483 U.S. at 207 (*quoting Pennhurst*, 451 U.S. at 17). *See also Gebser v. Lago Vista Indep. Sch. Dist.* 118 S. Ct. 1989, 1997 (1998) (requiring "actual notice" of failure to adhere to spending-contract obligations). "[S]tringent" adherence to these rules (*Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)) eliminates the possibility that the States will be treated as constructively (rather than explicitly) waiving their sovereign powers whenever they accept federal funds. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (overruling the "constructive-waiver" doctrine). In the final analysis, the rule that "Congress must express clearly its intent to impose conditions on the grant of federal funds," *id.* at 24, ultimately limits the reach of Congress's power under the Spending Clause and ultimately serves to preserve the "'constitutional balance between the States and the Federal Government.'" *Will v. Michigan Dep't*

of State Police, 491 U.S. 58, 65 (1989) (*quoting Atascadero*, 473 U.S. at 242).

B. Title VI Does Not Meet These Clear-Statement Requirements.

Measured against this test, respondents' effort to imply a right of action under a federal regulation fails. The language of Title VI simply does not support this right of action, and that alone suffices to reject this contention under the Court's clear-statement requirements.

1. Section 601 Does Not Create Any Such Cause of Action.

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d.

By any recognizable standard of meaning, Section 601 does not empower private individuals to bring disparate-impact claims against State governments. Still less does it do so with regard to generally-applicable laws requiring proficiency in English. In barring State recipients of federal funding from "discriminati[ng]" against persons "on the ground of race, color, or national origin," the provision merely proscribes what the Equal Protection Clause proscribes. It thus bars intentional-discrimination, not disparate-impact, claims. *See United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 328 (Brennan, J., concurring in the judgment in part and dissenting in part, joined by White, J., Marshall, J., Blackmun, J.). *See also Washington v. Davis*, 426 U.S. 229 (1976). By its terms, the core provision of Title VI neither expressly establishes a private cause of

action against States nor establishes a disparate-impact standard of care.

2. Section 602 Does Not Create Any Such Cause of Action.

Section 602 is equally unavailing. It does not create a cause of action, and indeed does not create any rights at all. One component of the section, moreover, implies (if not directs) that private-enforcement actions against funding recipients may not be prosecuted under agency regulations.

The Section 602 Framework. The first component of Section 602 delegates rulemaking authority to applicable federal agencies to "effectuate" Section 601. In doing so, it gives them authority to implement Title VI spending-power programs through administrative regulations.

> "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President."

Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1.

The second section sets forth guidelines to the relevant federal agencies for obtaining compliance with Section 601.

> "Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law."

Id.

And the third section contains procedural rules for establishing compliance under any of these options, including notice to the state agency, a requirement that the federal agency seek compliance initially by voluntary means, and a reporting mechanism for alerting Congress that a federal agency is considering the termination of federal funding.

> "*Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

Id. The next provision of Title VI—Section 603—permits judicial review of these agency decisions, both through actions by private individuals and by funding recipients. 42 U.S.C. § 2000d-2.

Section 602 Does Not Permit This Cause of Action. Whether looked at together or singly, all three components of Section 602 fail to authorize the challenge to Alabama's driving-license examination that Ms. Sandoval has filed here. Instead of establishing a different standard of care from Section 601, the provision merely allows federal agencies to "effectuate" section 601 by promulgating regulations. But it does not authorize federal agencies to create rules barring disparate effects arising from generally-applicable state programs that occur "merely in spite of," rather than "because of," an individual's national origin. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotation omitted).

An effort to bar disparate effects arising from such generally-applicable laws would not "effectuate" the objectives of Title VI, but would rewrite them. "Such regulations do not simply 'further' the purpose of Title VI; they go well beyond that purpose." *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring in the judgment); *id.* at 611 n.5 (Powell, J., concurring in the judgment) ("Administrative agencies do not have—and should not have—such lawmaking power"). It suspends reality to infer that Congress would statutorily *authorize* State action that disproportionately affects an identifiable group on the basis of national origin, then permit an executive-branch agency to *ban* such conduct through a private right of action under an administrative regulation. To our knowledge, the Court has never credited Congress with such an awkward state of mind. And, in many cases, the Court has refused to embrace any such view of congressional will. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) ("we generally examine the relevant statute to ensure that we do not fashion the parameters of an implied right in a manner at odds with the statutory structure and purpose"); *id.* at 292 ("the failure to [comply with the rule] does not itself constitute 'discrimination' under Title IX"); *id.* ("[w]e have

never held . . . that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements"); *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 173 (1994) ("the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of section 10(b)"); *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954).

Making matters worse for respondents' claim, Congress elsewhere has specifically created disparate-effect standards of liability in other statutory settings. *See, e.g.*, 12 U.S.C. § 4545(1) (mortgage lending); 20 U.S.C. § 1703(c) (school desegregation); 42 U.S.C. §§ 1973a, 1973a(b) (voting rights); 42 U.S.C. § 2000e-2(k) (Title VII); 42 U.S.C. §§ 12112(b)(3)(A) &12182(b)(1)(D)(i) (Americans with Disabilities Act); 12 U.S.C. §§ 1831u(a)(3)(B)(i) & 1831x(h) (banking); 15 U.S.C. § 6701(c)(2) (insurance); 42 U.S.C. § 1396b(m)(5)(A)(iii) (Medicaid). These enactments and others prove not just the ease with which such tests may specifically be established, but also demonstrate that the legislature knows how directly to mandate these far-reaching requirements when it wishes.

Even aside from the implausibility of making impermissible by regulation what is permissible by statute, Section 602 does not offer the slightest indication that Congress meant private parties to carry out the enforcement of such regulations. Quite the opposite is true. All efforts to bring States into "compliance" with Section 601 must follow a detailed procedure established by Section 602. First, the state entity must be "advised" by the federal agency of its failure to follow Title VI. Second, the federal agency must "determine[]" whether "compliance can[] be secured by voluntary means." Third, in the event the federal agency opts to "terminat[e], or refus[e] to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section," the agency "shall file with the committees of the House and

Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." Fourth, no termination action may go into effect until at least 30 days after this formal report has been filed. Fifth, Section 603 specifically authorizes judicial review of the *agency's* implementation decisions, whether by grant recipients or alleged third-party beneficiaries of the grant. 42 U.S.C. § 2000d-2.

As these oversight rules suggest, the Congress that enacted Title VI did not contemplate adherence to its requirements through private enforcement actions premised exclusively on agency regulations, as opposed to suspension of funding after a "hearing" or some other means implemented by the pertinent federal agency. It makes little sense to credit Congress with imposing strict requirements on federal agencies for bringing States into compliance, then to assume that all of these requirements evaporate if private individuals try to establish that compliance through enforcement of a rule that one of these same agencies promulgated. A Congress concerned with the former would not lightly allow the latter.

Nor does the alternative compliance provision—that the agency may obtain compliance "by any other means authorized by law"—change things. Congress, to be sure, permitted compliance to be accomplished either (1) by termination of funding after a "hearing," or (2) by "any other means authorized by law." Read in context, however, the "any other means" option is just that: Authorization to the federal government itself to use "any other means" to obtain compliance, not a delegation to any private individual to obtain compliance through an agency rule. The "any other means" option thus allows other federal-government actions against fund recipients, most frequently actions initiated by the Department of Justice on behalf of an agency.

Any doubt on this score is removed by the placement of the "any other means" option in Section 602. The statute

requires *both* compliance mechanisms established by Congress—funding termination or "any other means"—to follow the procedural prerequisites established by the all-encompassing proviso to Section 602. After listing these two compliance options, Congress gave this unequivocal mandate: "Provided, however, That *no such action* shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." (Emphasis added). Both types of compliance actions in other words must follow the oversight obligations placed on the pertinent agency—something that never happened here. The Justice Department rules reflect this very interpretation. They say that an "action to effect compliance by any other means authorized by law shall" not be taken "until" (1) the "responsible Department official has determined that compliance cannot be secured by voluntary means," (2) the action has been "approved by the Attorney General," and (3) the recipient of federal funds has been "notified of its failure to comply and of the action to be taken to effect compliance." 28 C.F.R. § 42.108(d). Under these circumstances, it is difficult to apprehend how the "any other means" option could support this independent right of action.

The legislative history also fails to advance respondents' claim. As the Court has held in comparable clear-statement settings, "legislative history has no bearing" here because the "unequivocal expression" must be "an expression in statutory text." *United States v. Nordic Village*, 503 U.S. 30, 37 (1992). "If clarity does not exist there, it cannot be supplied by a committee report." *Id.* At all events, the 1964 legislative history is utterly silent about disparate-impact standards of care, about English-proficiency requirements, and about a delegation of authority to federal agencies to create private rights of action that the Congress has not.

At the end of the day, a Congress that spoke with such care about what an agency of its own government could do in "effectuat[ing]" the objectives of Section 601 surely would not silently authorize private third parties to challenge State actions with no guidance whatsoever. Section 602's careful elaboration of a framework for obtaining compliance together with its ear-splitting silence authorizing private-enforcement actions against States under agency rules defeats respondent's claim. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

II. RESPONDENTS' CONTRARY ARGUMENTS ARE MISTAKEN.

A. *Chevron* Deference Does Not Advance This Claim.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), does not shore up these deficiencies in respondents' claim. Under *Chevron*, it is true, a federal agency charged with implementing a statutory program is given deference in promulgating regulations that clarify ambiguities in a statute. And the Department of Justice, it is also true, was given authority in Title VI to establish rules that "effectuate" Section 601. But, as shown above, the Court has already clarified that Title VI covers only intentional-discrimination, not disparate-impact, claims. *Bakke* and *Fordice* in short leave no ambiguity for the agencies to clarify. Even on a clean slate, moreover, ambiguity on this issue would be lacking here. As *Chevron* itself recognized, the statutory ambiguity that triggers administrative deference comes at the end, not at the beginning, of the search for statutory meaning—which is to say, *after* application of the clear-statement rule and other applicable interpretive principles. *Chevron*, 467 U.S. at 843 n.9. Applied here, those interpretive

rules eliminate the discretion-giving ambiguity that lends *Chevron* force.

But even if one somehow assumes that the Justice Department's disparate-impact regulation permissibly fills an interstitial gap in the statutory scheme, still another problem exists. Namely, an administrative regulation may never by itself supply the kind of clear statement that the Court's spending-power cases require. The clear statutory language that the *Pennhurst* canon of construction requires precludes the ambiguity-prompted regulation that the Department of Justice has claimed authority to innovate. The doctrine of *Chevron* deference simply has no tenable application to the setting of statutes that themselves do not clearly identify a standard of care applicable to state governments (or, worse, actually contradict that standard). Otherwise, every clear-statement case the Court has ever decided was simply an administrative regulation away from establishing the clarity that precedent demands.

This extension of *Chevron* would mean that the statutory ambiguity in the Fair Labor Standards Act in *Employees of the Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973), would have allowed the applicable federal agency to clarify that the FLSA applies to all state employees. It would mean that the statutory ambiguity in the Developmentally Disabled Assistance Act in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), would have allowed the applicable federal agency to promulgate a regulation requiring least-restrictive treatment. It would mean that the statutory ambiguity in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), would have allowed the applicable agency to pass a regulation clarifying that States could be exposed to money damages. It would mean that the statutory ambiguity in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), would have allowed an executive-branch agency to determine

that States were "persons" under Section 1983. It would mean that the statutory ambiguity in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), would have allowed an executive-branch agency to make the federal age discrimination laws applicable to state judges. And it would mean that the statutory ambiguity just last Term in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858 (2000), would have allowed an executive-branch agency to determine that States were "persons" under the *qui tam* provisions of federal law.

Nor may the United States insulate itself from the consequences of this analysis. This extension of *Chevron* thus would mean that the statutory ambiguity in *Lane v. Pena*, 518 U.S. 187 (1996), would have allowed an executive-branch agency to determine that the United States was subject to money-damages claims under Title II of the Americans with Disabilities Act. The same is true of other statutes. *See, e.g., United States v. Nordic Village*, 503 U.S. 30 (1992).

To state the problem this way, it seems to us, is to answer it. *Chevron* does not trump this time-respected canon, which is applicable to the Federal Government and States alike, converting a requirement of clear statement into one of clear silence.

This interpretation of *Chevron* also cannot be squared with one of the central justifications for allowing regulation of the States in the first instance. The principal explanation for *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)—that States protect their self-interest through their representatives in Congress—is of no help to the National Government here. If the States must be held accountable for exercising their political muscle in the Halls of Congress, surely Congress must be precluded from seizing such power beneath the radar of textually-mandated requirements or, worse, silently leaving it to the whim of an executive-branch agency to make these decisions. The Constitution nowhere permits Congress to delegate authority to the Executive Branch to decide when,

where, and whether to divest the States of authority, and to do so in such an indeterminate and unguided way. It should not be permitted to do so here.

Lastly the agency regulations, even on their own terms, do not supply the requisite clarity that the text of Title VI is so conspicuously missing. The disparate-effect rule adopted by the Department of Justice just says the following:

> "A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."

28 C.F.R. § 42.104(b)(2).

Doubtless this regulation purports to impose a disparate-effect test on state recipients of federal funding. It says that a "recipient . . . may not . . . utilize criteria . . . which have the effect of subjecting persons to discrimination because of their race, color, or national origin." Yet even assuming that the agency has authority to promulgate this regulation, it nowhere empowers private individuals—unambiguously or otherwise—to enforce the regulation by suits in federal court. This theory, too, must fail.

B. The Court's Implied Cause Of Action Cases Do Not Support This Action.

1. *Cort v. Ash* Cannot Be Reconciled With The Court's Clear-Statement Requirements.

Just as *Chevron* deference has no application to a regulatory standard that the text of a statute does not clearly establish, neither does *Cort v. Ash*, 422 U.S. 66 (1975), permit Congress to "imply" a cause of action against States that the National Legislature did not unambiguously establish. The invocation of *Cort v. Ash* thus does not support respondents' position.

Cort v. Ash did not involve a State defendant and it did not involve an agency regulation. It instead arose in the context of a claim that federal securities laws implicitly created a cause of action in favor of one private citizen (a disgruntled shareholder) against another private citizen (the chairman of the company's board of directors). In rejecting the claim, *Cort* established a four-factor balancing test for discerning when Congress (not federal agencies) meant to create a cause of action that it did not specifically provide for in the underlying statute. These factors are:

> "First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

Id. at 78.

Neither the concept of a *Cort v. Ash* claim in general nor the four-part balancing test for establishing the action in particular tenably apply to States in the context of Spending-Clause legislation. The very title of the *Cort v. Ash* test—an "implied" private right—fails to respect the interpretive principles that the Court has identified in this area of Federal-State sensitivity. And the four-part inquiry does not improve matters. It variously asks whether Congress "implicit[ly] . . . create[d] such a remedy," whether it is consistent with the statute and legislative history "to imply such a remedy" and whether state-law considerations make it inappropriate "to infer" such a cause of action. The implications and inferences that *Cort v. Ash* allows are anathema to the "unambiguous" expression that *Pennhurst* requires. In the context of a claim by an individual against a State in federal court, the *Cort v. Ash* inquiry thus must give way to the *Pennhurst* clear-statement requirement.

Nor has the Court ever held to the contrary. To our knowledge, the Court has never ruled that the rigorous *Pennhurst* clear-statement imperative may be satisfied through the casual *Cort v. Ash* inquiry in the context of a regulatory claim against a State. In point of fact, one Spending-Clause decision involving an action filed by an individual against a State, *Suter v. Artist M.*, 503 U.S. 347 (1992), appears to reconcile the *Pennhurst* and *Cort* lines of authority in much the way advocated here. In *Suter* individuals sought declaratory and injunctive relief against state officials in federal court, claiming violations of the "reasonable efforts" mandate of the Adoption Assistance and Child Welfare Act. In bringing the action, claimants argued that the Act created enforceable rights under section 1983 and alternatively that the Act created an implied right of action against the officials under *Cort v. Ash*. The Court applied a virtually identical analysis in rejecting each claim.

Starting with section 1983, the Court recognized that, in the context of Spending-Clause legislation, *Pennhurst* precludes a cognizable right from arising under section 1983 unless "Congress . . . do[es] so unambiguously" in the underlying statute. 503 U.S. at 356 (quoting *Pennhurst*, 451 U.S. at 17). *See id.* at 357 (framing the question presented as whether "Congress, in enacting the Adoption Act, unambiguously confer[red] upon the child beneficiaries of the Act a right to enforce the requirement" of the statute). Ultimately, the Court concluded that the Act "does not unambiguously confer an enforceable right upon the Act's beneficiaries". Rather, "[t]he term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner" laid out in the statute. *Id.* at 363.

After addressing the section 1983 claim in this fashion, the Court reasoned that the claim the "Act contains an implied right of action for private enforcement may be disposed of quickly." *Id.* at 363. Briefly, the Court observed that "[t]he most important inquiry here as well is whether Congress intended to create the private remedy," then reasoned that "[a]s discussed above, we think that Congress did not intend to create a private remedy for enforcement of the 'reasonable efforts' clause." *Id.* at 364. In applying the same analysis to both claims, *id.* ("here as well," "[a]s discussed above"), *Suter* confirms that the *Pennhurst* clear-statement requirement does not evaporate simply by the expediency of invoking *Cort v. Ash*.

In the final analysis, the clear-statement that *Pennhurst* requires applies with equal force to Spending-Clause claims prosecuted under *Cort v. Ash*—particularly with regard to claims brought solely under agency rules. Accordingly, in the absence of an "unambiguously" mandated statutory standard of care and an "unambiguously" created statutory cause of action,

no private enforcement is permitted. Respondent cannot meet this test.

2. This Regulatory Cause of Action Fails Even To Satisfy *Cort v. Ash*.

Nor at any rate does respondents' claim satisfy the requirements of *Cort v. Ash*. Respondents do not meet one of its four requirements.

"First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff?" *Cort*, 422 U.S. at 78. Far from creating a federal right in favor of non-English speaking individuals, the statute is coterminous with the Fourteenth Amendment and bars only disparate-treatment claims stemming from "discrimination" "on the ground of . . . national origin." This Court has never held that discrimination on the basis of language fluency represents a proxy for discrimination on the basis of national origin. "[T]he statute" simply does not create any such "federal right."

"Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?" *Id.* The extensive administrative enforcement scheme laid out in the statute, together with the notice and voluntary-compliance options required under it, evidence a design to deny such a private remedy, particularly a regulatory one. And the absence of statutory evidence establishing a remedy for non-English-speaking individuals presented with English-speaking requirements cements this conclusion.

"Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" *Id.* No. Not one piece of legislative evidence, whether in the statute itself or in its legislative history, offers any indication that generally-applicable English-proficiency rules would violate the statute. And the existence then, as well as the existence now, of federal English-proficiency requirements

makes any such design exceedingly implausible. Congress deserves more credit than to have silently banned a practice at the state level that it has long embraced at the federal level.

"And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.* Case law makes clear that the answer is yes. Driving licenses are state-law privileges, not rights, and the Court has long recognized that States have a "paramount interest . . . in preserving the safety of its public highways" and that they have "great leeway in . . . protect[ing] public health and safety." *Mackey v. Montrym*, 443 U.S. 1, 17 (1979). *See also Dixon v. Love*, 431 U.S. 105, 114 (1977) (recognizing the "important public interest in safety on the roads and highways").

Even beyond these four *Cort* inquiries, the disparate-effect regulation contains a separate implied-right-of-action flaw. The agency rule starts by saying that State grantees "may not . . . utilize criteria or other methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 28 C.F.R. § 42.104(b)(2). A Department of Justice regulation then elaborates that whether a state practice has an impermissible disparate effect is ultimately a matter of reasonableness. In the agency's words:

> Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take *reasonable steps*, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons.

42 C.F.R. § 42.405(d)(1) (emphasis added).

This regulatory requirement is insufficiently specific to create a private cause of action, as opposed to a ground for (at best) agency enforcement. *See Suter*, 503 U.S. at 360 (concluding that the requirement of "reasonable efforts" was unenforceable where there was "[n]o further statutory guidance . . . as to how 'reasonable efforts' are to be measured"); *cf. Blessing v. Freestone*, 520 U.S. 329, 345 (1997) ("Enforcement of such an undefined standard"—a right to "substantial compliance" with the federal standard—"would certainly 'strain judicial competence'") (quoting *Livadas v. Bradshaw* 512 U.S. 107, 132 (1994)).

The problem is, every law has a disparate impact on someone. No method of running government "has yet been devised which is free of all discriminatory impact." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973). And across-the-board efforts to regulate disproportionate impacts wherever federal dollars appear would "be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes," *Washington v. Davis*, 426 U.S. 229, 248 (1976)—many of which have their own salutary purposes and effects. The wide range of disparate-impact challenges brought so far under the Title VI regulations, to say nothing of those that will be filed if this claim is recognized, bear out this risk. Private citizens have brought challenges under these regulations to the validity of entire school-funding systems of the States, *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 579 (1999), to the validity of student proficiency and graduation requirements, *Cureton v. National Collegiate Athletic Ass'n*, 198 F.3d 107 (3d Cir. 1999), to the validity of the relocation of businesses and government services, *Bryant v. New Jersey Department of Transportation*, 987 F. Supp. 343 (D.N.J.), *vacated in part*, 998 F. Supp. 438 (D.N.J. 1998), to the validity of bus and subway fare increases, *New York Urban*

League, Inc. v. Metropolitan Transportation Authority, 905 F. Supp. 1266 (S.D.N.Y.), *vacated and remanded*, 71 F.3d 1031 (2d Cir. 1995), and to the validity of real property tax assessments, *Coleman v. Seldin*, 687 N.Y.S.2d 240 (N.Y. Sup. Ct. 1999). Against the backdrop of these lawsuits and numerous others, it provides cold comfort to governmental officials to know that the expense of defending these lawsuits can be ended once they take "reasonable steps" to eliminate all disparate impacts arising from generally-applicable laws. The absence of guidance regarding this far-reaching standard not only will "strain judicial competence," but it also proves that *Cort v. Ash*, even on its own terms, does not support this cause of action.

C. The Court's Title VI Decisions Are Not Inconsistent With, And Indeed Support, This Analysis.

Continuity and change, it is true, have marked the Court's decisions interpreting Title VI and other statutes modeled after it. But at no point has the Court held that federal agencies may innovate private rights of action that Congress itself did not create. Through 26 years of decisions, whether in the context of Title VI or other federal-spending statutes, the Court has never held that agencies may assume this unique authority and has never held that this assumption of authority may be squared with the *Pennhurst* clear-statement requirement. The Court should not do so now.

Claimants argued below, and will presumably argue here, that *Lau* and *Guardians* authorize these private causes of action. Yet, as both the court of appeals and district court appeared to recognize, that is not case. *See* Pet. App. at 42a (appellate court recognized that this Court "has yet to squarely answer the question"); Pet. App. at 117a (district court relied only on this Court's "implicit reasoning").

Start with *Lau v. Nichols*, 414 U.S. 563 (1974). In 1973, the San Francisco public school system compelled all children between the ages of six and 16 to attend public school while at the same time providing "special English instruction" to "no more than 1,707 of the 3,457 Chinese students" who "spoke little or no English." *Id.* at 564 n.1 & 566. In the face of a program that "foreclosed . . . any meaningful education," *id.* at 566, claimants challenged the school district's failure to "rectify the situation" under the Equal Protection Clause and Title 601 of the Civil Rights Act of 1964, which the Court characterized as barring "discriminat[ion] against racial groups." *Id.* at 565.

In granting relief to claimants because the "school system . . . denies them a meaningful opportunity to participate in the educational program," *Id.* at 568, *Lau* engaged in a truncated analysis. Instead of addressing the constitutional claim, the decision "rel[ied] solely on section 601" in analyzing the program. *Id.* at 566. Then, in construing Section 601, *Lau* did not ask whether the statutory standard paralleled the constitutional standard or even whether the statute created a cause of action in favor of plaintiffs. It did not ask whether the creation of a statutory cause of action and the standard of care under it needed to be expressly stated or could be implied. It did not clarify whether the disparate-effect regulation or several other education-specific regulations controlled the analysis. And it did not ask whether regulations may impose a standard that the statute expressly does not.

Time has not been kind to the *Lau* analysis. While an instinct of invalidity may well surround the dilemma that the school children faced and while the result in *Lau* may well be justified on other grounds, *see* The Bilingual Education Act, 20 U.S.C. §§ 7402(b), 7403, 7421, 7422-25, *Lau*'s interpretation of section 601 no longer remains good law. Two years after *Lau*, the Court held that the Equal Protection Clause bans only intentional discrimination, not disparate-effect discrimination.

Washington v. Davis, 426 U.S. 229 (1976). And two years after that, the Court squarely rejected the contention that Section 601—the "sole[]" statutory basis for *Lau*, 414 U.S. at 566—proscribes disparate-effect claims. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In his opinion, Justice Powell concluded that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause." 438 U.S. at 287. And Justices Brennan, White, Marshall, and Blackmun likewise concluded that "Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's." *Id.* at 352. These observations were far from casual. A conclusion in *Bakke* that Title VI barred more than the Constitution would have doomed any form of affirmative action. Even the use of race as one of a number of factors that an admissions department may consider and that five Justices separately approved would still deny federally-funded benefits on "the ground" of race.

In *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), "[s]even Members of the Court agree[d] that a violation of the statute itself requires proof of discriminatory intent." 463 U.S. at 608 n.1. And other members of the Court indicated that *Lau* no longer was good law. *See id.* at 611 & n.4 (Powell, J., concurring) in the judgment (*Lau* "reach[ed] its conclusion essentially without supporting reasoning," and the *Bakke* "construction" of Title VI "necessarily requires rejection of the prior decision in *Lau*"); *id.* at 615 (O'Connor, J., concurring in the judgment) ("In my view, the logical implications of [the *Bakke*] interpretation require that *Lau* be overruled"). By 1992, to the extent doubt still remained on this score, the Court eliminated it in *United States v. Fordice*, 505 U.S. 717, 732 n.7. "Our cases make clear, and the parties do not disagree," the Court held, "that the reach of Title VI's protection extends no further than the Fourteenth Amendment."

More than just a misapprehension about the scope of Section 601, however, undercuts *Lau*'s precedential value. Perhaps because many of these points were not argued in *Lau*, the decision fails to consider a host of relevant statutory-interpretation questions that later decisions require. It does not consider whether Congress meant to create a private right of action under Title VI; it does not consider what the appropriate standard for establishing such a cause of action would be; it does not consider the degree of statutory clarity needed to establish such a cause of action; and it does not consider whether an agency may create a cause of action and right that the Congress did not. When all is said and done, the *Lau* framework no longer states the correct law in this area.

Nor do the six opinions in *Guardians Ass'n v. Civil Service Commission of City of New York*, 463 U.S. 582 (1983), present a controlling theory for addressing this issue or again address many of the arguments raised here. At issue in *Guardians* was not an English-proficiency requirement but a race-discrimination claim. Black and Hispanic police officers claimed that the New York City police department's entry-level written examinations had a discriminatory impact on them, and filed a suit on that basis under Title VI and its implementing regulations. The court of appeals rejected the claim on the theory that Title VI required proof of discriminatory intent. Five Justices of the Court, in separate opinions, ultimately affirmed that judgment, though they did so on a variety of different "grounds." *Id.* at 584.

Justice White, joined by Justice Rehnquist, expressed the view that there was only a limited cause of action to enforce Title VI regulations. They reasoned that "relief in private [disparate impact] actions should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations." *Id.* at 598. Justice Powell, joined by Chief Justice Burger, concurred in the

judgment, concluding that no private right of action to enforce the regulations could be implied. They explained:

> The legislative history of Title VI is replete with references to the Act's central purpose of ensuring that taxpayers' money be spent nondiscriminatorily. In accord with this purpose, Congress expressly provided for perhaps the most effective of all remedies in a federal funding statute: the cutting off of funds. In addition, it created a carefully constructed administrative procedure to ensure that such withholding of funds is ordered only where appropriate. In light of these factors, I do not believe that Congress intended to authorize private suits but failed to do so through some inadvertence.

Id., 463 U.S. at 609-10 (Powell, J., concurring in the judgment) (internal citations and footnote omitted). Justice Powell also believed that the regulations could not create a right not contained in the statute. *Id.* at 611 n.5 ("Administrative agencies do not have -- and should not have -- such lawmaking power"). Justice O'Connor concurred in the judgment on the ground that the agency could not create a disparate-effect cause of action. Because Title VI requires a showing of intentional discrimination, she concluded, the agencies exceeded their authority in promulgating disparate-impact regulations. *Id.* at 612-15 (O'Connor, J., concurring in the judgment).

Instead of looking to the opinions of these five Justices who concurred in the judgment dismissing plaintiffs' disparate-impact claim, the Eleventh Circuit aggregated Justice White's opinion with the separate dissenting opinions. Together, the court of appeals concluded, these writings produce a majority of Justices for the proposition that private plaintiffs may bring causes of action under the Title VI regulations. Pet. App. at 44a. This method of opinion reading, however, is a discredited one. *See United States v. Morrison*, 120 S. Ct. 1740, 1757 (2000); *Agostini v. Felton*, 521 U.S. 203, 217 (1997). The

only holding in the case is that private plaintiffs *were not* permitted to bring their claims against a city government. Far from supporting the court of appeals' analysis, the *Guardians* judgment is consistent with the analysis urged by Alabama here. The same is true of the Court's more recent Title VI decision in *Fordice*:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." 34 C.F.R. § 100.3(b)(6)(i) (1991). Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. [Citing *Bakke* and *Guardians*] We thus treat the issues in these cases as they are implicated under the Constitution.

Id. at 732 n.7.

While neither *Lau* nor *Guardians* answers the question presented today, that is not to say that the Court necessarily must invalidate these disparate-impact regulations in order to reject respondents' claim. The central issue here is whether private citizens may enforce these regulations against States in federal court. No doubt the inquiry into congressional intent that animates the private-right-of-action question shares similarities with, if not parallels, the inquiry into the validity of an administrative regulation. Yet it remains possible that the regulations may be enforced by executive-branch agencies. After all, the extensive procedural protections that Congress put in place to guard against over-zealous enforcement of Title VI by federal agencies may suffice to show that Congress meant to allow the agencies to create disparate-impact rules for their own enforcement, just not for enforcement by private citizens.

Like *Lau* and *Guardians*, other decisions interpreting other statutes do not foreclose the analysis we have advanced either. No doubt decisions interpreting Title IX and Section 504 of the Rehabilitation Act of 1973, both partly modeled after Title VI, have implied (or seemed to imply) private rights of action. *See, e.g., Alexander v. Choate*, 469 U.S. 287 (1985) (Rehabilitation Act); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (Title IX). And no doubt *Cannon* suggested, without deciding the issue, that Section 601 of Title VI permits an implied right of action for intentional-discrimination claims. *See Cannon*, 441 U.S. at 702 n.33; *see also Gebser*, 118 S. Ct. at 1994. The *Cannon* suggestion also may have been codified in the Rehabilitation Act Amendments of 1986, which were designed to abrogate the States' immunity from suit in Title IX, the Age Discrimination Act of 1975, Section 504 of the Rehabilitation Act, Title VI and "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." P.L. 99-506, Title X § 1003, 100 Stat. 1845, 42 U.S.C. § 2000d-7. But these developments in no way extend to implied private rights of action premised on agency regulations. *Cannon*, for example, did not apply a clear-statement rule, did not involve a disparate-impact claim, and above all did not enforce a regulatory right but a statutory one. The Rehabilitation Act Amendments of 1986 specifically refer only to "suit[s]" under "Federal statute[s]," 42 U.S.C. § 2000d-7(a)(1), and "suit[s] against a State for a violation of a statute," *id.* at 2000d-7(a)(2). They say nothing at all about private rights of action under regulations.

Alexander v. Choate is no more helpful. It concluded that the Rehabilitation Act, unlike Title VI, reached "action that discriminated by effect as well as by design." *Id.* at 297. It then "resisted" "too facile an assimilation of Title VI law to Section 504." *Id.* at 293 n.7. And it ultimately concluded that "the regulations do not in fact support respondents' action." *Id.* at 294 n.10. In the end, neither *Cannon*, *Alexander* nor any other precedent supports the creation of an implied right of

action brought by individuals against States on the basis of an administrative regulation. No such action should be implied here.

CONCLUSION

The lower-court decision should be reversed.

Respectfully submitted,

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ADDENDUM

APPENDIX A

Sample of State English-Language Requirements

ALABAMA

Ala. Const. Amend. No. 509 (Establishing English as the official state language, prohibiting legislature from passing any law that diminishes English as the common language of citizens)

Ala. Code

§ 2-26-7 (Containers of seed to be labeled in English)

§ 5-18-16 (Loan contracts to be provided to consumers in English)

§ 6-8-60 (Official notices must be published in English)

§ 10-2B-1.20 (Articles of incorporation to be filed in English)

§ 12-16-60 (English proficiency requirement for jurors)

§ 25-9-362 (Mine safety rules and regulations to be printed in English)

§ 27-30-14 (Insurance policyholders to be provided contracts in English)

§§ 27-34-10, -19 (Articles of incorporation and minutes of fraternal benefit societies to be in English)

§ 28-4-119 (Liquor containers to be labeled in English)

§§ 34-29-72, -73 (English proficiency required for license to practice veterinary medicine; examinations administered in English only)

§ 35-12-38 (Notice of sales of property or securities by state treasurer must be published in English)

Ala. Admin. Code r.

364-X-8-.03 (English-only requirement for licensure of professional geologists)

610-X-4-.07 (English proficiency requirement for nursing license)

ALASKA

Alaska Stat.

§ 06.20.270 (Terms of loan must be provided to borrower in a statement written in English)

§ 08.29.130 (English proficiency requirement for licensed professional counselors educated in foreign countries)

§ 08.80.110 (English proficiency requirement for licensed pharmacists)

§ 08.84.032 (English-only requirement for examinations for foreign-trained physical and occupational therapists)

§ 09.20.010 (English proficiency requirement for jurors)

§ 21.84.070 (Fraternal benefit societies must file documents in English)

§ 44.12.310 (English is the official language of the State of Alaska)

§ 44-12.320 (English must be used by all government agencies in official functions and in compiling official public documents and records)

Alaska Admin. Code tit. 12

§ 52.140 (English proficiency requirement for license as pharmacy technician)

§ 54.040, § 54.110 (English proficiency requirement for applicant for a physical therapist or physical therapy assistant

license who received an education and degree outside the United States)

ARIZONA

Ariz. Rev. Stat.

Const. Art. 20 Par. 8 (English proficiency requirement for all State officers and members of the State Legislature)

Const. Art. 28 § 1 (Establishing English as the official state language)

Const. Art. 28 § 2 ("This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.")

Const. Art. 28 § 3 (Requiring English for all official actions of state, requiring that no state law, order, decree or policy may require the use of a language other than English, and providing that no governmental document "shall be valid, effective or enforceable unless it is in the English language")

§ 3-237 (Seed containers to be labeled in English)

§ 6-401 (Requiring publication of notices regarding banks and savings and loan associations to be made in newspapers printed in English)

§§ 10-120, 10-3120 (Documents filed pertaining to corporations must be in English or with English translation)

§ 11-402 (English proficiency requirement to hold county office)

§ 15-752 (Mandating classroom instruction in English, except classes of bilingual instruction or foreign language instruction)

§ 21-201 (English proficiency requirement for jury service)

§ 32-1232 (English proficiency requirement to obtain license to practice dentistry)

§ 32-1423 (English proficiency requirement to obtain license to practice medicine)

§ 32-1972 (Poisons must be labeled in English)

§ 32-2124 (English proficiency requirement for real estate professionals)

§ 36-796.02, 796.04 (Bedding must be labeled in English)

§ 38-201 (English proficiency requirement to hold a state, county, city, town or precinct office)

§ 44-1644 (Scrap metal dealers must keep records of transactions in English)

ARKANSAS

Ark. Code

§ 1-4-117 (Establishing English as the official language of the state)

§ 2-19-303 (Liming material to be labeled in English)

§§ 4-27-120, 4-32-1308, 4-33-120 (Documents filed pertaining to corporations must be in English)

§ 6-16-104 (English-only policy for instruction in all the schools of the state, public and private)

§ 7-4-109 (English proficiency requirement for members of the State Board of Election Commissioners, the members of each county board of election commissioners, and election officials)

§§ 11-7-403, -411 (English proficiency requirement for mine workers and mine inspectors; English-only requirement for examinations)

§ 16-10-107 (Legal process and proceedings must be in English)

§ 16-31-102 (English proficiency requirement for jury service)

§ 17-96-304 (English-only requirement for podiatry examinations)

§ 20-27-205 (Bedding must be labeled in English)

§§ 23-74-202, -301 (Fraternal benefit societies must keep minutes and file documents in English)

CALIFORNIA

Cal. Const. Art. 3, § 6 (Establishing English as the official state language)

Cal. Bus. & Prof. Code

§ 11 (Requiring notices, reports, statements, and records to be made in the English language)

§ 1630, 1636, 3053 (Examinations for licenses to practice dentistry and optometry shall be given in English)

§ 8023.5 (English proficiency requirement for shorthand reporters)

§ 8565 (English proficiency requirement for structural pest control operators)

§ 10153 (English proficiency requirement for applicants for real estate licenses)

§ 21505 (Secondhand watches must be so labeled in English)

§ 25613 (Draught beer must be labeled in English)

Cal. Civ. Proc. Code

§ 185 ("Every written proceeding in a court of justice in this state shall be in the English language")

§ 203 (English proficiency requirement for jury service)

Cal. Corp. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

Cal. Educ. Code

§ 70 (Requiring notices, reports, statements, and records to be in English)

§ 305 (English-only policy for classroom instruction)

§ 44252 (English proficiency requirement for issuance of "any credential, permit, certificate, or renewal of an emergency credential to any person to serve in the public schools")

§51801 (Home teachers must provide instruction in English)

§ 94975 (Administrative proceedings to be conducted in English)

Cal. Elec. Code

§ 7 (Requiring notices, reports, statements, and records to be in English)

§ 12303 (English proficiency requirement for members of precinct board)

Cal. Fin. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

§ 1936 (Requiring state banks to maintain records, financial records, and books of account in English)

§ 6002 (Notice of annual or special meetings to be given in English-language newspaper)

Cal. Fish & Game Code

§ 7 (Requiring notices, reports, statements, and records to be in English)

§ 7923 (Requiring holders of licenses to keep a "true record in the English language of all fish taken")

§ 8050 (Commercial fishermen and fish dealers must keep accounting records in English)

Cal. Food & Agric. Code

§ 11 (Requiring notices, reports, statements, and records to be in English)

§§ 29448, 52452, 52453 (Honey and seed containers to be labeled in English)

Cal. Gov't Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

§§ 11435.20, 11513 (Requiring hearings to be conducted in English)

Cal. Harb. & Nav. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

§ 447.5 (Requiring communication of seagoing vessels in Vessel Traffic Service area with the marine exchange to be in English)

§ 721 (English proficiency requirement for yacht and ship brokers)

Cal. Health & Safety Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

§108800 (Warnings to be printed in English)

Cal. Ins. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

§§ 11011, 11138 (Fraternal benefit societies must file documents and keep minutes in English)

Cal. Mil. & Vet. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

Cal. Penal Code

§ 893 (English proficiency required for jury service)

Cal. Prob. Code

§ 8002 (To initiate proceedings on a foreign-language will, it must submitted with an English translation)

Cal. Pub. Res. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

Cal. Pub. Util. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

Cal. Rev. & Tax. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

Cal. Sts. & High. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

Cal. Unemp. Ins. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

Cal. Veh. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

Cal. Water Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

Cal. Welf. & Inst. Code

§ 8 (Requiring notices, reports, statements, and records to be in English)

COLORADO

Colo. Const. art.

2, § 30a (Establishing English as the official language of the state)

Colo. Rev. Stat.

§§ 7-64-1103, 7-90-301, 7-101-201, 7-121-201 (Requiring documents filed with secretary of state relating to partnerships, corporations and other business organizations to be in English)

§ 10-14-301 (Fraternal benefit societies must file certain documents in English)

§ 11-37.5-116 (Requiring foreign capital depository to keep its corporate records, financial records, and books of account in English)

§ 12-22-116 (English proficiency requirement for druggist licenses)

§§ 12-32-105, 12-36-115 (English-only requirement for podiatry license examinations)

§ 12-55-104 (English proficiency requirement for notaries public)

§ 13-1-120 (English requirement for court proceedings)

13-71-105 (English proficiency requirement for jury service)

§§ 17-1-101, 27-1-102 (Medical personnel employed by Department of Corrections and Department of Human Resources may be exempted from the "Colorado Medical Practice Act" if they meet certain requirements, including English proficiency)

§ 38-20-140 (Certain legal documents originating in foreign countries may only be executed if accompanied by an English translation)

CONNECTICUT

Conn. Gen. Stat.

§ 10-145f (English proficiency requirement for prospective teachers seeking admission to a teacher preparation program)

§§ 20-108, -126j (Examinations for licenses to practice dental medicine, dental surgery or dental hygiene to be given in English)

§ 20-146 (Examination for license to practice optometry to be given in English)

§ 21-47 (Any individual or business entity failing to keep business records in English is guilty of a Class A misdemeanor)

§ 21-48 (Lodging houses must keep records in English)

§ 21a-233 (Tags on bedding and upholstered furniture must be in English)

§ 22-56 (Seed containers must be labeled in English)

§ 31-131 (Employment agencies required to give information in English)

§ 38a-598, -616 (Fraternal benefit societies must keep minutes and file documents in English)

Conn. Agencies Regs.

§ 20-90-57 (English proficiency requirement for nursing license)

§ 20-576-4 (English proficiency requirement for pharmacist license)

§ 29-349-190 (English proficiency requirement for driver's license to transport explosives)

§ 29-349-281 (English proficiency requirement for driver's license to transport blasting agents)

DELAWARE

Del. Code tit.

3, §§ 1502, -1503 (Seed containers must be labeled in English)

6, § 1303 (Secondhand watches must be labeled in English)

10, § 4509 (English proficiency requirement for jury service)

18, §§ 6207, -6210 (Fraternal benefit societies must keep minutes and file documents in English)

24, § 1720 (English proficiency requirement to obtain license to practice medicine)

24, § 1721 (Requiring medical licensing examinations to be given in English)

Delaware Insurance Regulation No. 13 (English language requirement for insurance statements)

FLORIDA

Fla. Stat.

§ 102.012 (English proficiency requirement for members of election boards)

§ 117.01 (English proficiency requirement for notaries public)

§ 319.21 (Mobile homes and motor vehicles brought from other states must have a statement of origin, which must be written in English)

§ 464.008 (English proficiency requirement for applicants for licensure as a nurse)

§ 509.101 (Public lodging establishments and public food service establishments must print rules and regulations in English)

§ 513.117 (Recreational vehicle parks must print rules and regulations in English)

§ 516.15 (Borrowers must be given a statement of loan terms in English)

§§ 578.09, -578.091 (Seed containers must be labeled in English)

§§ 607.0120, 608.4081, 617.01201, 620.8105 (Business documents required to be in English)

Fla. Admin. Code Ann.

30B-13.002 (English proficiency requirement for employment as bus driver)

38I-40.015 (Requiring warning labels and warning signs related to asbestos hazards to be in English)

64B9-3.002 (English proficiency requirement for nursing license)

64B16-26.205 (Applicant for pharmacist licensure examination must show proficiency in English)

GEORGIA

Ga. Code

§ 2-11-22 (Seed containers must be labeled in English)

§ 7-1-392 (Articles of incorporation for banks and trust companies must be in English)

§ 7-1-719 (International banking companies must submit reports in English)

§ 7-3-18 (Borrowers must be given a statement of loan terms in English)

§ 10-1-122 (Paint labels must be in English)

§§ 14-2-120, 14-3-120 (Business documents required to be in English)

§ 15-12-163 (English proficiency requirement for jury service)

§§ 21-2-92, 21-2-214 (English proficiency requirement for registrars, deputy registrars and poll officers)

§ 26-2-268 (Egg cartons must be labeled in English)

§ 26-4-41 (English proficiency requirement for graduates of foreign schools of pharmacy)

§ 40-2-27 (Motor vehicle title documentation and application must be in English)

§ 40-5-147 (English-only requirement for examination for commercial drivers' license)

§ 43-11-40 (English-only requirement for examination for license to practice dentistry)

§ 50-3-100 (Establishing English as the official state language)

Ga. Comp. R. & Regs.

100-2-.01 (Requirement that all chiropractic examinations be conducted in English)

360-7-.01 (English proficiency requirement for provisional medical license)

410-6-.02 (English proficiency requirement for nursing license)

480-3-.01, 480-4-.02 (English proficiency requirement for pharmacist license)

490-2-.02 (English proficiency requirement for physical therapist assistant license)

HAWAII

Haw. Rev. Stat.

Organic Act Chapter II, § 44 (Requiring legislative proceedings to be conducted in English)

Organic Act Chapter IV, § 83 (English proficiency requirement for jury service)

§ 11-72 (English proficiency requirement for election precinct officials)

§ 149A-15 (Pesticides must be labeled in English)

§§ 150-24, -25 (Seed containers must be labeled in English)

§ 237-41 (Taxpayer records must be maintained in English)

§ 281-78 (Draught beer must be labeled in English)

§ 332-3 (Bedding must be labeled in English)

§ 460J-13 (English proficiency requirement for pest control operators)

IDAHO

Idaho Code

§ 2-209 (English proficiency requirement for jury service)

§ 22-415 (Seed containers must be labeled in English)

§ 26-1712 (International banking companies must submit to the State reports made under oath and written in English)

§§ 30-1-120, 30-3-2 (Business documents required to be in English)

§§ 41-3207, -3210 (Fraternal benefit societies must keep minutes and file documents in English)

§ 44-1302 (English proficiency requirement for minor under sixteen years of age to be employed during school hours)

§ 51-104 (English proficiency requirement for notaries public)

§ 73-121 (English requirement for documents to be filed in any state, county, city or district office or endorsed by officials to be in English)

Idaho Admin. Code

§ 02.02.14.200, .210 (Requirement that all information required to appear on consumer and non-consumer packaging shall appear in English)

§ 22.01.01.052 (English proficiency required for license to practice medicine)

ILLINOIS

Ill. Comp. Stat. Chap.

10, §§ 5/13-4, 5/14-1 (English proficiency requirement for judges of election)

20, § 1015/3 (Requiring public employment office sign to be in English)

35, § 120/7 (Retailers must keep records in English)

35, § 130/11 (Cigarette distributors must keep records in English)

35, §§ 620/7, 625/7 (Taxpayers must keep records in English)

50, § 330/3 (Municipal public hearing to be noticed in English)

110, § 520/8c (English proficiency requirement for teachers)

225, § 710/26 (Explosives to be labeled in English)

815, § 410/2 (Secondhand watches must be so labeled in English)

Ill. Admin. Code tit.

2, § 553.30 (English proficiency requirement for hearing officer)

68, §§ 1150.30, 1150.60 (English proficiency requirement for licensure as an architect)

68, § 1200.30 (English proficiency examination required for certification as a certified shorthand reporter)

68, § 1270.5 (English proficiency requirement for license as professional land surveyor-in-training)

68, §§ 1270.10, 1270.30 (English proficiency requirement for license as professional land surveyor)

68, § 1285.60 (English-only requirement for examinations for licenses to practice any branch of medicine or chiropractics)

68, §§ 1300.20, 1300.30 (English proficiency requirement for nursing license)

68, § 1330.30 (English proficiency requirement for pharmacist license)

68, § 1340.30 (English proficiency requirement for license as a physical therapist)

68, §§ 1380.250, 1380.280 (English proficiency requirement for license as a professional engineer)

68, § 1400.40 (English proficiency requirement for license as a clinical psychologist)

68, § 1480.135 (English proficiency requirement for license as a structural engineer intern)

INDIANA

Ind. Code

§ 1-2-10-1 (Adopting English as the official language of Indiana)

§ 3-6-6-7 (English proficiency requirement for precinct election officers)

§ 3-11-10-36 (English proficiency requirement for members of absentee voter boards)

§ 4-1-5-1 (Notice of sale of bonds by state universities and colleges must be published in an English-language newspaper)

§ 8-1-2-84 (Notices of consolidation or merger, or acquisition, lease, sale or encumbrance of property by utilities required to be published in a newspaper printed in English)

§ 9-24-2-3 (Prohibits Driver's License Bureau from issuing a license or permit to anyone "who is unable to understand highway warnings or direction signs written in the English language")

§ 25-23-1-11 (English proficiency requirement for persons seeking license as registered nurses)

§ 25-23-1-12 (English proficiency requirement for persons seeking license as practical nurses)

Ind. Admin. Code

327, r. 8-12-3 (English proficiency requirement to operate a wastewater or water treatment plant)

410, r. 7-5-1 (Requiring food products to be labeled in English)

631, r. 1-1-14 (Requiring filing of power of attorney to be written in English)

675, r. 12-6-7 (Requiring plans and specifications filed with the Building Safety and Fire Prevention Commission to be in English)

710, r. 1-9-2 (English language requirement for applications filed with the Securities Division)

856, r. 1-3.1-1 (English-only requirement for pharmacist licensure examination)

IOWA

Iowa Code

§ 189.9 (Requires that certain products be labeled in English language)

§ 199.6 (Requires containers of any inoculant for leguminous plants to bear a label containing certain information in the English language)

§ 341A.10 (English proficiency requirement for employment as a deputy county sheriff in any position under civil service)

§ 486A.1201 (Partnership documents filed with the office of the secretary of state must be written in English)

§ 487.108 (Documents of limited partnerships filed with the office of the secretary of state must be written in English)

§ 490.120 (Documents of business corporations filed with the office of the secretary of state must be written in English)

§ 490A.120 (Documents of limited liability companies filed with the office of the secretary of state must be written in English)

§ 499.40 (Articles of incorporation of cooperative associations must give information in English)

§ 512B.8 (English language requirement for minutes of meetings of fraternal benefit societies)

§ 512B.11 (English language requirement for fraternal benefit society documents that are required to be filed with the commissioner of insurance)

§ 556.12 (English language requirement for publication of legal notices regarding abandoned property)

§ 556.17 (English language requirement for publication of legal notices regarding disposition of unclaimed property)

§ 607A.4 (Minimum qualifications for service as juror include proficiency in English)

§ 618.1 (English language requirement for publication of notices of legal proceedings)

Iowa Admin. Code

§ 201-50.10(356,356A) (English proficiency requirement for jail personnel)

§ 201-51.8(356,356A) (English proficiency requirement for personnel of temporary holding facilities)

§§ 645-200.3(147), 645-200.4(147) (English proficiency required for license as a physical therapist)

§ 653-11.2(147,148,150,150A) (English proficiency required for license to practice medicine and surgery, osteopathic medicine and surgery, or osteopathy)

§ 653-14.4(147,148E) (English proficiency required for license as an acupuncturist)

§ 657-2.12(155A) (English proficiency required for license as a pharmacist, for graduates of schools located outside the United States)

§ 761-607.27(321) (English-only requirement for commercial driver's license endorsement for transportation of hazardous materials)

KANSAS

Kan. Stat.

§ 2-1002 (English language requirement for labeling of "commercial feeding stuffs")

§ 2-1204 (English language requirement for labeling of commercial fertilizer)

§ 2-1417 (English language requirement for labeling of seeds)

§ 17-5211 (English requirement for publication of notice of meetings of savings and loan associations)

§ 40-744 (English language requirement for minutes of meetings of fraternal benefit societies)

§ 47-503 (English requirement for labeling of certain livestock products)

§ 53-118 (Lack of English proficiency grounds for denial of appointment as notary public)

Kan. Admin. Regs.

§ 60-3-106 (English proficiency requirement for licensure by State Board of Nursing for graduates of foreign nursing schools where instruction was not given in English)

§ 69-15-7 (English-only requirement for examination for license of permanent color technicians, tattoo artists, and body piercing technicians)

§ 100-6-5 (English proficiency requirement for applicants for license from Kansas State Board of Healing Arts)

§ 100-7-1 (English-only requirement for examinations given by Kansas State Board of Healing Arts)

KENTUCKY

Ky. Rev. Stat.

§ 2.013 (Designating English as the official language of the State of Kentucky)

§ 29A.080 (Lack of English proficiency is grounds for disqualification from jury service)

§ 38.090 (English proficiency required for service in the Kentucky National Guard)

§ 90.330 (English proficiency required for civil service employment)

§§ 95.440, 95.762 (English proficiency examination required for police and fire department employees)

§ 164.297 (English proficiency requirement for instructors in state colleges and universities)

§ 186.440 (Driver's license not to be issued to persons "unable to understand highway warnings or direction signs in the English language")

§ 186A.097 (English-only requirement for documents provided for registration of motor vehicles)

§ 250.041 (Seeds must be labeled in English)

§§ 271B.1-200, 273.252, 275.045 (Corporate documents to be filed with secretary of state must be in English)

§ 304.14-435 (English-only requirement for all insurance policies and other documents required to be filed with the department of insurance)

§ 311.571 (English language proficiency required to obtain license to practice medicine)

§§ 314.041, 314.042, 314.051 (English language proficiency required to obtain nursing licenses)

§ 327.060 (English language proficiency required to obtain license as a physical therapist)

§ 351.110 (Applicants for certification as a mine inspector, mine safety analyst, electrical inspector, mine safety instructor, mine foreman, or assistant mine foreman may be denied permission to take examination if they lack proficiency in English)

Ky. State Admin. Proc., Part II

§ 8 (English proficiency required for jury service)

LOUISIANA

La. Rev. Stat.

§ 1:52 (Legal notices are sufficient if published only in English)

§ 3:202 (English language requirement for articles of incorporation of agricultural credit corporations)

§ 3:1436 (Requirement that seeds be labeled in English)

§ 6:705 (English language requirement for articles of incorporation of savings and loan associations)

§ 12:24 (English language requirement for articles of incorporation of business corporations)

§ 13:2582 (English proficiency requirement for justices of the peace)

§ 13:2583 (English proficiency requirement for constables)

§ 22:2003 (English language requirement for health maintenance organizations)

§ 35:391 (English language requirement for ex-officio notaries)

§ 37:920 (English proficiency required to obtain license as registered nurse)

§ 37:1025 (English proficiency required for participation in drug-administration course)

§ 37:1877 (Records of purchases of cemetery artifacts by antique dealers must be kept in English)

§ 40:852 (Self-rising flour must have label in English)

§ 40:1057.1 (Hazardous aerosols must have English labels)

§ 43:19 (Acts of the legislature required to be published in English)

§ 47:2181 (English-only requirement for publication of notices of tax sales)

§ 51:761 (Certain information must be stamped on boots and shoes by manufacturers in English)

§ 56:309.4 (Soft-shell crab shedders required to maintain records in English)

§ 56:637 (Wholesale/retail dealers must keep records in English of all reptiles and amphibians bought and sold)

MAINE

Me. Rev. Stat.

Title 1 § 601 (Legal notices must be published in a newspaper printed in English)

Title 7 § 507 (Hazardous substances must be labeled in English)

Title 7 § 1043 (Seeds must be labeled in English)

Title 14 § 1211 (English proficiency is prerequisite for qualification for jury service)

Title 24A § 4104 (Documents of fraternal benefit societies that are required to be filed must be in English)

Title 24A § 4135 (Minutes of domestic societies must be in English)

Title 32 § 2205-A (English proficiency required for license to practice professional nursing as a registered professional nurse)

Title 32 § 2284 (English proficiency required for foreign-trained applicants for occupational therapist license)

MARYLAND

Md. Ann. Code

Agriculture, § 9-104 (Requires labeling of "every lot of severed turf grass sod, plugs, and sprigs" in English)

Agriculture, § 9-206 (Requires labeling of treated seeds in English)

Agriculture, § 9-207 (Requires labeling of agricultural seeds in English)

Agriculture, § 9-208 (Requires labeling of vegetable and herb seeds in English)

Agriculture, § 9-209 (Requires labeling of flower, tree and shrub seeds in English)

Commercial Law, § 12-308 (Consumer loan disclosures must be in English)

Courts and Judicial Proceedings, § 8-207 (Lack of sufficient knowledge of English is grounds for disqualification from jury service)

Health Occupations, § 1A-302 (English proficiency required for license as acupuncturist)

Health Occupations, § 8-302 (English proficiency required for license as a registered nurse or licensed practical nurse)

Health Occupations, § 12-302 (English proficiency required for license as a pharmacist)

Health Occupations, § 13-302 (English proficiency required for license as a physical therapist)

Health Occupations, § 14-307 (English proficiency required for license as a physician)

Health Occupations, § 14-506 (English proficiency required for license as an acupuncturist)

Health Occupations, § 15-303 (English proficiency required to be a certified physician's assistant)

Health Occupations, § 16-302 (English proficiency required for license as a podiatrist)

Transportation, § 16-103.1 (Ability to understand highway warning or direction signs written in the English language required to obtain driver's license)

MASSACHUSETTS

Mass. Gen. Laws ch.

94B § 1 (Labeling in English required for certain hazardous substances)

112 § 75 (Examination for nursing license required to be given in English)

112 § 152 (English proficiency required for licensure as acupuncturist)

128 § 85 (Seeds required to be labeled in English)

140 § 62 (Requirement that records on second hand motor vehicles be kept in English)

140 § 79 (Requirement that pawnbrokers keep records in English)

148 § 13 (Notice of public hearing prior to granting license to store explosives required to be given in newspaper published in English)

176 § 4 (Documents of fraternal benefit societies required to be filed in English)

Mass. Admin. Code

237 CMR 4.04 (All examinations administered by the State Examiners of Electricians required to be given in English)

243 CMR 5.02 (English proficiency required for license to practice acupuncture)

244 CMR 8.03 (English proficiency required to be licensed as a professional nurse)

244 CMR 8.04 (English proficiency required to be licensed as a practical nurse)

247 CMR 3.01 (English proficiency required to be licensed as a pharmacist)

255 CMR 4.04 (Registered sanitarian must pass a licensing examination that "shall be administered in the English language")

259 CMR 2.02 (English proficiency required of applicants seeking license from Allied Board of Health Professionals)

527 CMR 13.06 ("Vehicles transporting explosive materials shall only be driven by and be under the control of a properly licensed driver who is physically fit, careful, capable, reliable, able to read and write the English language. . . .")

527 CMR 13.07 ("Motor vehicles transporting blasting agents shall be driven by a properly licensed driver not less than 21 years of age. The driver shall be physically fit, careful, capable, reliable, and able to read and write the English language.")

540 CMR 2.15 (English proficiency required to obtain license to operate a school bus)

995 CMR 2.06 (Applicants for Pilot Candidate Training required to demonstrate fluency in English)

995 CMR 2.07 (Applicants for a Commission of Warrant Pilot required to demonstrate fluency in English)

MICHIGAN

Mich. Comp. Laws

§ 42.7 (Township boards required to keep records in English)

§ 119.3 (Districts required to keep legislative journals in English)

§ 123.961j (Sales of bonds by local building authorities required to be published in English)

§ 257.303 (Secretary of state prohibited from issuing driver's license or chauffeur's license to persons unable to understand highway warning or direction signs in the English language)

§ 257.1352 (Automobile dealers required to maintain records of buying or receiving used motor vehicle parts in English)

§ 324.76703 (Notice of sale of certain bonds required to be given in newspaper published in the English language)

§ 333.16174 (English proficiency required for certain persons licensed or registered by public health agency)

§ 339.2505 (English proficiency required to obtain license as real estate agent or broker)

§ 445.484 (Dealers of precious metals and gems required to maintain certain records in English)

§ 446.205 (Pawnbrokers, auctioneers and vendors required to maintain certain records in English)

§§ 450.1132, 450.2132 (Corporate documents must be presented in English for filing)

§ 491.208 (Documents of savings and loan associations must be presented in English for filing)

§ 729.204 (English proficiency required for jury service)

MINNESOTA

Minn. Stat.

§§ 21.82, 21.83 (Seeds required to be labeled in English)

§ 65A.01 (Disclosures in fire insurance policies must be made in English)

§ 147.037 (English proficiency required for license to practice medicine)

§ 148.71 (English proficiency required for license as a physical therapist)

§ 153A.19 (Dispensers of hearing aids required to furnish customers with contracts in English)

§§ 302A.115, 317A.115, 322B.12 (Requires articles of incorporation of business organizations to be written in English)

§ 325E.21 (Wire and cable dealers required to keep records in English)

§ 325F.31 (Bedding required to be labeled in English)

§ 331A.02 (Newspapers must be printed in the English language in order to publish official notices)

§ 331A.05 (Public notices must be disseminated in English)

Minn. Gen. R. Prac., Rule 808 (English proficiency required for jury service)

MISSISSIPPI

Miss. Code Ann.

§ 3-3-31 (Establishes English as the state language)

§ 27-5-159 (Tax records, books and accounts to be kept in English)

§ 27-19-103 (Tax books and records of common and contract carrier of property or passengers to be maintained in English)

§ 27-65-43 (Sales tax records to be kept in English)

§ 67-1-57 (English proficiency requirement for permit to sell alcoholic beverages at retail)

§ 73-9-23 (English proficiency requirement for license to practice dentistry or dental hygiene)

§ 73-15-19 (English proficiency requirement for license as a registered nurse)

§ 73-15-21 (English proficiency requirement for license as a practical nurse)

§ 73-21-85 (English proficiency requirement for license as a pharmacist)

§ 73-23-51 (English proficiency requirement for license as a physical therapist)

§ 73-23-53 (English proficiency requirement for temporary license as a physical therapist)

MISSOURI

Mo. Rev. Stat.

§ 1.028 (Recognizing English as the common language used in Missouri)

§ 80.200 (Requires notice by publication in English)

§ 84.120 (English proficiency required for employment as policeman, turnkey, or officer of police)

§ 84.570 (English proficiency required for appointment as a policeman or an officer of police)

§ 115.085 (English proficiency required for appointment as an election judge)

§ 266.051 (Seeds required to be labeled in English)

§ 266.321 (Fertilizer required to be labeled in English)

§ 311.620 (English proficiency required for appointment as agent, assistant, deputy or inspector under the provisions of the liquor control law)

§ 330.040 (English-only requirement for podiatrist examination)

§ 335.046 (English proficiency requirement for license as registered nurse)

§ 340.228 (English-only requirement for license examination to practice veterinary medicine)

§ 351.046 (Corporate documents required to be filed with secretary of state in English)

§ 476.050 (All writs, process, proceedings and records in any court are required to be maintained in the English language)

§ 486.220 (English proficiency requirement for notaries public)

§ 494.425 (English proficiency required for jury service)

Mo. Code of Regs.

4 § 150-3.010 (English proficiency requirement for professional physical therapists)

17 §§ 10-2.050, 20-2.035, 20-4.035 (Applicant for license as private security guard or watchman must demonstrate English proficiency)

19 § 30-40.342 (Applicant for license as emergency medical technician must demonstrate English proficiency)

MONTANA

Mont. Code

§ 1-1-510 (Establishing English as the "official and primary language of the state and local governments" and establishing English-only policy by prohibiting use of any foreign language by "government officers and employees acting in the course and scope of their employment or for government documents and records")

§ 3-1-314 (Establishing English-only policy for courts, providing "Every written proceeding in a court of justice in this state must be in the English language, and judicial proceedings must be conducted, preserved, and published in no other.")

§ 32-5-303 (Requiring loan disclosures to be provided to consumers in English)

§§ 35-1-217, 35-2-119, 35-10-111 (Requiring corporate documents filed with the secretary of state to be in English)

§§ 37-3-305, 37-3-305 (English proficiency requirement for license to practice medicine)

§ 37-3-311 (English-only requirement for examination for license to practice medicine)

§ 37-3-315 (English proficiency requirement for restricted license to practice medicine)

§ 37-4-301 (English-only requirement for examination for license to practice dentistry)

§ 37-10-302 (English-only requirement for examination for license to practice optometry)

§ 50-30-202 (Requires labeling of hazardous substances in English)

§ 70-30-207 (English proficiency requirement for appointment of condemnation commissioners)

NEBRASKA

Neb. Rev. Stat.

CONST Art. I, § 27 (Declares English to be the official state language; requires all official proceedings, records and publications to be in English; and requires all classroom instruction to be in English)

§ 4-107 (Requires publication of notice of sale of decedent's property in an English language newspaper)

§ 14-566 (Requires publication in a daily newspaper, published in the English language, of all public advertisements, notices, ordinances, resolutions, council proceedings, and all other matter published by the city)

§ 19-1831 (English proficiency requirement for civil servants)

§ 19-3011 (English proficiency requirement for appointees to municipal offices)

§ ~~21-1903 (Documents~~ filed with the Secretary of State under the Nebraska Nonprofit Corporation Act "must be in the English language")

§ 21-2003. (Documents filed with the Secretary of State under the Business Corporation Act "shall be in the English language")

§ 25-1601 (Requires English proficiency for jury service)

§ 32-221 (Requires English proficiency for persons appointed as election officials)

§ 32-231 (Requires English proficiency for persons appointed as judges and clerks of election)

§ 39-2001 (Requires publication of notice of designation of county roads in an English language newspaper)

§ 44-1078 (Requires that the minutes of proceedings of the supreme governing body and of the board of directors of domestic societies be in the English language)

§ 44-1081 (Requires that documents of domestic societies required to be filed with the Director of Insurance be in the English language)

§ 45-145 (Lenders must provide disclosures under the federal Consumer Credit Protection Act in English)

§ 48-304 (Certificate under Child Labor Act must verify that "the child can read and legibly write simple sentences in the English language")

§ 69-1311, 1316 (State Treasurer must publish notice of disposition of unclaimed property "in an English language legal newspaper")

§ 71-387 (Requires English proficiency for cosmetologist license)

§ 71-2803 (Requires English proficiency for physical therapy license)

§ 71-6039 (Nursing assistants must be "able to speak and understand the English language or a language understood by a substantial portion of the nursing home residents")

§ 71-6603 (Home health aides must be "able to speak and understand the English language or the language of the home health agency patient and the home health agency staff member who acts as the home health aide's supervisor")

§ 76-2229.01-2230 (Requires English proficiency for licensed real estate appraisers)

§ 77-1804, 2804 (Notice of property to be sold at tax sales are required to be published in the English language)

§ 79-808 (Requires English proficiency for teachers)

§ 81-2.147.02 (Requires seeds to be labeled in English)

NEVADA

Nev. Rev. Stat.

§ 1.040 ("Every written proceeding in a court of justice in this state, or before a judicial officer, shall be in the English language")

§ 6.010 (English proficiency requirement for jury service)

§ 78.028 (Corporate documents to be filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 78A.015 (Documents of closed corporations filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 80.040 (Documents of foreign corporations filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 81.003 (Miscellaneous documents filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 82.528 (Documents of nonprofit corporations filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 84.100 (Documents of sole corporations filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 86.566 (Documents of limited liability companies filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 88.338 (Documents of limited partnerships filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 89.027 (Documents of professional corporations and associations filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 433.269 (English proficiency required for employment as psychiatrist, psychologist, social worker or registered nurse by the administrator of the Division of Mental Health and Developmental Services)

§ 454.080 (Poisons required to be labeled in English)

§ 587.091 (Seeds required to be labeled in English)

§ 600.025 (Trademark and trade name documents filed with the secretary of state must be written in English or accompanied by a verified translation)

§ 632.160 (Examinations of foreign-trained applicants for nursing license must test for English proficiency)

§ 632.280 (Examinations of foreign-trained applicants for practical nursing license must test for English proficiency)

§ 635.060 (English-only requirement for examination for podiatrist license)

§ 636.180 (English-only requirement for examination for optometrist license)

§ 646.020 (Pawnbroker records of transactions "must be legibly written in the English language")

§ 647.110 (Records of secondhand sellers "must be legibly written in the English language")

§ 656.160 (Certified court reporters must pass a written examination "to determine whether the applicant has [a] good understanding of the English language ")

§ 695A.060 (Documents filed with the insurance commissioner "must be in the English language")

§ 695A.120 (Minutes of meetings of fraternal benefit societies must be written in the English language)

§ 706.8841 (English proficiency requirement for license to drive taxicab)

Supreme Court Rules, Rule 51.5 (To be certified to take the bar examination, graduates of unaccredited law schools must have practiced law for ten years in a country "where English is the language of instruction and practice in the courts of that jurisdiction")

NEW HAMPSHIRE

N.H. Rev. Stat.

§ 3-C:1-2 (English is official state language - "designated as the language of all official public documents and records, and of all public proceedings and nonpublic sessions," with certain enumerated exceptions)

§ 82-A:11 (All books, records, papers and other tax documents required to be kept in English)

§ 189:19 (Requires instruction in schools to be in English, with the exception of approved bilingual education programs)

§ 261:4 (Certificates of title for motor vehicles must be in English)

§ 261:131 (Automotive recycling dealers required to keep a record book in English)

§ 293-A:1.20 (Documents filed under the Business Corporation Act are required to be in English)

§ 304-C:2 (Documents of limited liability companies are required to be in English)

§ 318:18 (English proficiency requirement for obtaining license as a pharmacist)

§ 328-A:12 (English proficiency requirement for physical therapists educated outside the United States)

§ 329:10 (English-only requirement for examinations for license of physicians and surgeons)

§ 339-A:3 (Hazardous substances must be labeled in English)

§ 398:12 (Records of pawnbrokers must be maintained in English)

§ 433:2 (Label for agricultural, vegetable and flower seeds must be in English)

§ 433:3 (Label for tree and shrub seeds must be in English)

§ 500-A:7 (English proficiency requirement for jury service)

§ 509:1 (Requires English to be used in court documents)

§ 550:10 (Requires legal notices to be published in English)

NEW JERSEY

N.J. Stat.

§ 2B:20-1 (English proficiency requirement for jury service)

§ 4:8-17.14 (Containers of seed treated with a substance harmful to man or animals must be labeled in English)

§ 4:8-17.15 (Containers of seeds must be labeled in English)

§ 14A:1-6 (Corporate documents filed with secretary of state must be in English)

§ 15A:1-7 (Nonprofit corporate documents filed with secretary of state must be in English)

§ 17:11C-34 (Disclosure statements provided by consumer lenders must be in English)

§ 17:44B-7 (Minutes of meetings of fraternal benefit societies must be in English)

§ 17:44B-10 (Filed documents of domestic societies must be in English)

§ 18A:64-53 and 18A:64A-25.2 (English language requirement for "legal newspapers")

§ 19:6-2 (English fluency requirement for service as a member of a district board of any municipality)

§ 21:1A-134 (English fluency requirement for applicants for permit "to manufacture, store, sell, transport or use explosives")

§ 26:10-4.9 (Labels on bedding must be in English)

§ 30:4-3.11 (English fluency requirement for correctional officers)

§ 30:4-14 (English fluency requirement for human services police officers)

§ 30:8-18.1 (English fluency requirement for county correctional officers)

§ 35:1-2 (English language requirement for publication of official advertisements)

§ 40:11A-22.2 and 40A:9-154.9 (English fluency requirement for parking enforcement officers)

§ 40:52-12 (Applicants for licenses required to publish notice in a newspaper printed in the English language)

§ 40A:14-9 (English fluency requirement for fire department employees)

§ 45:5-7 (English-only requirement for podiatry examination)

§ 45:8-35 (English proficiency requirement for license as professional engineers and land surveyors)

§ 45:9-15 (English-only requirement for examinations for licenses for practice of medicine and surgery)

§ 45:9-42.7 (English-only requirement for examinations for licenses for bio-analytical laboratory director)

NEW MEXICO

N.M. Stat.

§ 14-11-10 (Legal notices required to be published in English)

§ 14-12-2 (English proficiency requirement for notaries public)

§ 21-8-3 (Course of instruction of New Mexico State University "shall embrace the English language")

§ 49-6-13 (Requires publication in an English language newspaper of certain proposed improvements to public buildings)

§ 59A-5-29 (English language translation must accompany foreign-language insurance filings)

§ 59A-44-7 (English-only requirement for minutes of meetings of domestic societies)

§ 59A-44-10 (English-only requirement for all documents filed by domestic societies)

§ 61-18A-10 (English-only requirement for examinations for collection manager's license)

§ 72-18-3 (Defines "publication" for purposes of the Flood Control District Act to mean "publication . . . in the English language")

§ 72-19-4 (Defines "publication" for purposes of the Southern Sandoval County Arroyo Flood Control Act to mean "publication . . . in the English language")

§ 74-10-4 (Defines "publication" for purposes of the Solid Waste Authority Act to mean "publication . . . in the English language")

§ 76-10-13 (Requires that seeds be labeled in English)

Uniform Jury Instruction (UJI) 4-110 (Qualification questionnaire requires that potential jurors disclose whether they read, write, speak and understand the English language)

NEW YORK

N.Y. Abandoned Property Laws § 402 (Requires publication in a newspaper printed in the English language)

N.Y. Agri. & Mkts. § 137 (Requires that seeds be labeled in English)

N.Y. Agri. & Mkts. § 52 (Requires labeling of adulterated spirits of turpentine in English)

N.Y. Agri. & Mkts. § 250-e (Requires that certain certificates be provided in English)

N.Y. Bank § 352 (Requires that Truth in Lending disclosures be given in English)

N.Y. Bank § 9003 (Requires that corporate certificates and other filed documents be in English)

N.Y.C.P.L.R. Rule 2101 (Requires that papers served and filed be in English)

N.Y. Dom. Rel. § 221 (Requires publication of divorce proceedings in a newspaper in the English language)

N.Y. Elec. § 3-400 (English proficiency requirement for election inspectors and poll clerks)

N.Y. Elec. § 3-401 (English proficiency requirement for election coordinators)

N.Y. Gen. Bus. § 69-o (English-only requirement for security or fire alarm installers)

N.Y. Gen. Bus. § 179 (Licensed persons required to keep registers of employment in the English language)

N.Y. Real Prop. § 441 (English proficiency requirement for real estate brokers and salesmen)

NORTH CAROLINA

N.C. Gen. Stat.

§ 9-3 (English proficiency requirement for prospective jurors)

§ 53-232.12 (Licensed international banking corporations must make written reports in English)

§ 55-1-20 (Documents filed with the Secretary of State pursuant to the Business Corporation Act must be in English)

§ 55A-1-20 (Documents filed with the secretary of state pursuant to the Nonprofit Corporation Act must be in English)

§ 57C-1-20 (Documents filed with the secretary of state pursuant to the Limited Liability Company Act must be in English)

§ 58-24-30 (English language requirement for minutes of meetings of fraternal benefit societies)

§ 58-24-45 (Documents to be filed by fraternal benefit societies must be in English)

§ 59-73.7 (English language requirement for documents filed under Uniform Partnership Act)

§ 90-187 (Applicants for license to practice veterinary medicine who are graduates of foreign schools must demonstrate English proficiency)

§ 90-202.6 (English-only requirement for license examinations for podiatrists)

§ 90-270.30 (English proficiency requirement for licensure of foreign-trained physical therapists)

§ 91A-7 (Records of transactions with pawnbrokers must be made in English)

§ 106-277.3 (Seeds must be labeled in English)

§ 145-12 (Establishes English as the official language of North Carolina)

NORTH DAKOTA

N.D. Cent. Code

§§ 4-09-10, -11, -11.1, -11.2 (Containers of seed to be labeled in English)

§ 15-10-13.1 (English proficiency requirement for professors, instructors, teachers, assistants, and graduate assistants at state institutions of higher education)

§ 19-21-01 (Hazardous substances must be labeled in English)

§§ 26.1-15.1-07, -10 (Fraternal benefit societies must keep minutes and file documents in English)

§§ 27-09.1-08, 28-14-06, 29-17-34 (English proficiency requirement for jurors)

§ 43-17-18 (English proficiency requirement for physicians and surgeons)

§ 54-02-13 (Establishing English as official state language)

OHIO

Ohio Rev. Code

§ 907.29 (Requires seeds to be labeled in English)

§ 3345.281 (Teaching assistants must be proficient in English)

§ 2945.25 (English proficiency requirement for jurors)

§ 317.113 (Records and Indexes must be in English)

§ 3501.27 (English proficiency requirement for election officials)

§ 4731.142 (English proficiency requirement for physicians)

§ 3719.08 (Controlled substances must be labeled in English)

§ 317.113 (Records and indexes must be translated into English)

§ 3505.12 (Ballot instructions must be in English)

§ 1561.17 (English proficiency requirement for mine foreman)

§ 4729.08 (English proficiency requirement for licensed pharmacists)

OKLAHOMA

Okla. Stat. tit.

12 § 572 (English proficiency requirement for jury service)

15 § 612 (Second-hand watches must be labeled in English)

16 § 28 (English language requirement for recorded real estate documents)

19 § 444 (Reports of official proceedings of board of county commissioners must be published in an English-language newspaper)

59 § 144 (Podiatrist examination must be in English)

59 § 493.2 (English proficiency requirement for medical license)

59 § 698.8 (English proficiency requirement for veterinarian license)

59 § 887.6 (Physical therapist examination must be in English)

70 § 3224 (English proficiency requirement for teachers)

OREGON

Or. Rev. Stat.

§ 246.310 (English proficiency requirement for election board clerks)

§ 680.060 (Dental hygienist exam must be in English)

§ 111.255 (Probate documents must be in English or translated into English)

§ 241.225 (English proficiency requirement for county civil service employment)

§ 52.689.255 (English proficiency requirement for pharmacists)

§ 194.022 (English proficiency requirement for notary public)

§ 36.453.035 (Hazardous substances must be labeled in English)

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851-031-0006 (English proficiency required for nursing license)

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Pa. Cons. Stat. Ann. tit.

42 § 25-4502 (English proficiency requirement for jurors)

24 § 6803 (Higher education teachers are evaluated for fluency in English)

40 § 1142.202 (Articles of incorporation and minutes of fraternal benefit societies to be in English)

52 § 70.215 (Miner examinations must be given in English)

3 § 285-3 (Seed packages must be labeled in English)

7 § 1004 (Banking articles of incorporation must be in English)

15 § 1306 (Business articles of incorporation must be in English)

35 § 978 (Mattresses, bedding and upholstery must be tagged in English)

43 § 476 (Posting of notices in lead manufacturing establishments must be in English)

52 § 701-206 (English proficiency requirement for certified mine foremen and mine electricians)

53 § 4432 (Junk shops and secondhand stores must keep their books in English)

53 § 12234 (English proficiency requirement for employment in the department of public safety as a policeman or fireman)

63 § 151 (English proficiency requirement for engineers and land surveyors)

63 § 271.8 (English-only requirement for osteopath examinations)

63 § 281-11 (Pawnbroker records and books must be kept in English)

63 § 422.24 (English proficiency requirement for physicians and surgeons)

RHODE ISLAND

R.I. Gen. Laws

§ 2-6-3 (Containers of seed to be labeled in English)

§ 5-37.2-12.1 (English proficiency requirement for doctors of acupuncture)

§§ 17-11-8, -12 (English proficiency requirement for election officials and moderators and clerks of voting districts)

§ 16-25.2-4 (English proficiency requirement for teachers of deaf students)

§ 19-26-5 (Pawnbrokers to keep records in English)

§ 23-24-2 (Hazardous substances must be labeled in English)

§ 23-28.28-30 (English proficiency requirement for drivers of vehicles transporting blasting agents)

§ 30-16-1 (Contracts for construction of bomb shelters must be in English)

SOUTH CAROLINA

S.C. Code

§ 1-1-696 (English language is the official language of the State of South Carolina)

§ 1-1-697 (Use of language other than English prohibited except to increase proficiency in English)

§ 14-7-810 (English proficiency requirement for jurors)

§ 23-39-20 (Hazardous substances warnings must be in English)

§ 33-1-200 (Partnership documents must be in English)

§ 40-22-260 (English proficiency requirement for engineers and land surveyors)

§ 40-41-50 (Formulas of medicines must be placed on packages or bottles in English)

§ 40-28-110 (English proficiency requirement for landscape architects in order to be eligible for registration)

§ 40-43-50 (English proficiency requirement for licensed pharmacists)

§ 40-45-100 (English proficiency requirement for physical therapists)

§ 46-21-210 (Agricultural seeds must be labeled in English)

§ 46-27-310 (Commercial feeds must be labeled in English)

§ 59-103-160 (English proficiency requirement for instructional faculty)

SOUTH DAKOTA

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§ 1-27-22(6) (Expert testimony must be translated into English for deliberations and records)

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§ 58-37A-7, -10 (Fraternal benefit societies must keep minutes and file documents in English)

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20:38:14:02 (English proficiency required to take examinations administered by state Board of Technical Professions)

20:51:01:10 (English proficiency requirement for pharmacists)

61:09:06:01 (English proficiency requirement for certificate of authorization to possess explosive devices for the protection of sunflower crops from depredating birds)

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Tenn. Code

§ 4-1-404 (English is the official and legal language of Tennessee)

§ 43-10-104 (Agricultural and vegetable seeds must be labeled in English)

§ 48-11-301 (Corporate documents must be in the English language)

§ 56-25-1202 (Minutes of fraternal benefit society must be kept in English)

§ 61-2-1101 (Limited partnership documents must be kept in English)

§ 62-2-301 (English proficiency requirement for architects, engineers and landscape architects in order to be eligible for registration)

§ 62-18-109 (English proficiency requirement for land surveyors in order to be eligible for registration)

§ 63-3-111 (Podiatrist examination must be in English)

§ 63-12-115 (Veterinarian examination must be in English)

§ 68-27-102 (Hazardous substance warnings must be in English)

TEXAS

Tex. Health & Safety Code § 345.021 (Bedding must be labeled in English)

Tex. Educ. Code § 51.917 (Classes, other than foreign language classes, must be taught in English)

Tex. Educ. Code § 28.005 (Declaring English to be the basic language of instruction in public schools)

Tex. Transp. Code § 522.043 (English proficiency requirement for interstate commercial driver's license)

Tex. Prop. Code § 11.002 (Public records of real or personal property must be in English)

Tex. Agric. Code § 72.005 (A report, notice, statement, or record filed under the Mexican Fruit Fly Control chapter must be in English)

Tex. Admin. Code tit.

22, § 71.6 (English-only requirement for chiropractic examinations)

22, § 131.52 (English proficiency required to obtain engineering license)

22, § 163.3 (English proficiency required to obtain medical license)

22, § 217.4 (English proficiency required to obtain nursing license)

22, § 329.1 (English proficiency required to obtain physical therapist license)

37, § 15.52 (Applicant must understand highway signs in the English language to obtain driver's license)

37, § 16.8 (English proficiency required for commercial driver's license to drive in interstate commerce)

UTAH

Utah Code

§ 16-6A-105 (Requiring documents presented for filing to be in English)

§ 16-10A-120 (Requiring documents presented for filing to be in English)

§ 58-67-302 (English proficiency requirement to obtain license as physician or surgeon)

§ 58-68-302 (English proficiency requirement to obtain license as osteopathic physician or surgeon)

§ 58-69-302 (English proficiency requirement to obtain license as dentist or dental hygienist)

§ 58-71-302 (English proficiency requirement to obtain license as naturopathic physician)

§ 61-2-6 (Applicants for license as real estate principal broker, associate broker, or sales agent must pass examination that includes English proficiency component)

§ 76-10-907 (Junk dealers and scrap metal processors required to maintain records in English)

§ 78-7-22 (Requiring that judicial proceedings be conducted in English)

§ 78-46-7 (English proficiency requirement for jury service)

Utah Rules of Civil Procedure, Rule 4 (Requiring that legal notice by publication be given in English)

VERMONT

Vt. Stat. tit.

4 § 731 ("Writs, processes, complaints, informations, indictments, pleas, answers and entries in the courts, except technical terms, shall be in the English language.")

4 § 962 (English proficiency required for jury service)

8 § 4464 (Requiring documents filed by fraternal benefit societies to be in English)

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11A § 1.20, 11B V.S.A. § 1.20 (Requiring corporate documents filed with the secretary of state to be in English)

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26 § 1393 (English-only requirement for medical examinations)

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27 § 1226 (Notice of sale of abandoned property must be published in English)

VIRGINIA

Va. Code

§§ 3.1-106.5, -126.3, -264, -828.5, -832 (Requirement that regulated products be labeled in English)

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§ 50-73.17, -73.83 (Requiring partnership documents to be filed in English)

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§ 55-210.13 (Requiring report of treasurer to be published in a newspaper printed in English)

§ 55-210.18 (Requiring notice of sale of abandoned property to be published in English language newspaper)

U.S. Dist. Ct. Rules W.D.Va., Pt. 28 (English proficiency requirement for jury service)

12 Va. Admin. Code § 5-30-270 (English proficiency requirement for personnel involved in the delivery of Emergency Medical Services)

18 Va. Admin. Code § 10-20-250 (English proficiency requirement to obtain professional engineering license)

24 Va. Admin. Code § 15-170-100 (English proficiency required to drive motor tank truck transporting petroleum products)

WASHINGTON

Wash. Rev. Code

§ 2.36.070 (English proficiency requirement for jury service)

§ 18.06.090 (English proficiency requirement for acupuncturist)

§ 18.50.060 (Midwifery examination must be in English)

§ 18.57.080 (Examinations in osteopathy must be in English)

§ 18.71.051 (English proficiency requirement for physicians)

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§ 18.92.100 (English-only requirement for examinations for license to practice veterinary medicine)

§ 23B.01.200 (Business corporation documents must be filed in English)

§ 30.42.200 (Books and accounts of banks and trusts shall be kept in English)

§ 41.08.070 (English proficiency requirement for civil service employment)

§ 42.44.20 (English proficiency requirement for notaries public)

§ 45.40.010 (English proficiency requirement for judge or clerk of election)

§ 48.36A.070 (Fraternal benefit society minutes must be kept in English)

§ 65.16.020 (A legal newspaper must be published in English)

§ 81.40.110 (English proficiency requirement for railroad flagman)

WEST VIRGINIA

W. Va. Code

§ 3-1-28 (English proficiency requirement for election officials)

§ 16-7-2 (Articles or ingredients of articles of food or drink must be labeled in English)

§ 18-2-7 ("The basic language of instruction in all schools, public, private and parochial, shall be the English language only.")

§ 19-16-2 (Containers of seed to be labeled in English)

§ 21-6-3 (Minor seeking work permit must provide proof of school attendance or demonstrate proficiency in English language)

§ 22A-2-54 (Mining rules and regulations to be posted in English)

§ 22A-8-6 (English-only requirement for certification examination for underground and surface miners)

§ 29C-7-101 (English proficiency requirement for notaries public)

§ 30-3-10 (English proficiency requirement for physicians, surgeons and podiatrists; examinations for such professions given only in English)

§ 30-7-7 (English proficiency requirement for registered nurses)

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§ 52-1-8 (English proficiency requirement for jury service)

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WISCONSIN

Wis. Stat.

§ 7.30 (English proficiency requirement for election officials)

§ 29.09 (Hunting, trapping and fishing licenses shall be in English)

§ 29.134 (Fur dealers must keep books in English)

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§ 29.544 (Wild rice dealers must keep books in English)

§ 35.35 (All printing of proposed constitutional amendments and resolutions must be in English)

§ 94.39 (Agricultural and vegetable seed labels must be in English)

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WYOMING

Wyo. Stat.

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§ 33-9-105 (English-only requirement for podiatry examination)

§ 33-17-104 (Hotel room rates to be posted in English in each guest room)

§ 33-18-102 (Books and records of junk dealers must be kept in English)

FOR ARGUMENT

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JAMES ALEXANDER, *et al.*,

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v.

MARTHA SANDOVAL, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether the discriminatory effects regulations adopted by federal agencies to effectuate Title VI of the Civil Rights Act of 1964 are enforceable by private litigants in actions for prospective injunctive relief?

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STATEMENT OF THE CASE

A. Factual and Procedural Background

"Like forty-eight other states and the District of Columbia, the State of Alabama has historically administered the written portion of its . . . driver's license examination in a multitude of foreign languages." Pet. App. 58a. From at least the 1970's until 1991, the Alabama Department of Public Safety "administered thousands of written examinations in at least fourteen languages." Pet. App. 58a-59a. It obtained translations "at no cost," added new languages when "demand was great enough," and never found that "non-English speakers posed a greater safety risk or had more accidents than other motorists." Pet. App. 59a; *see* Pet. App. 168-69a. Several thousand individuals a year obtained driver's licenses by taking the translated tests. Pet. App. 169a n.56. The Department encountered "no significant problems in administering the examination" in other languages. Pet. App. 59a; *see* Pet. App. 168a.

In July 1990, the Alabama legislature ratified Amendment 509 to the Alabama Constitution. Pet. App. 59a. The Amendment declares that "English is the official language of the state of Alabama" and requires state officials to take "all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced." Ala. Const. amend. 509. In December 1991, in response to Amendment 509, the Department adopted the policy at issue in this case, requiring that "all driver license examinations . . . be printed and administered in English." Pet. App. 169a (citation omitted). The "sole justification" for the English-only policy was the passage of Amendment 509 to the Alabama Constitution. Pet. App. 205a; *see* Pet. App. 169a.

Despite its adoption of this English-only rule, the Department continued to license a variety of drivers who could not read English. The Department accommodated the illiterate, for example, by reading the examination to them in English. Pet. App. 176a. The Department offered a sign language version of the examination to deaf illiterate applicants. Pet. App. 179a-80a. Even if applicants could not

read, speak, or understand a word of English, the Department allowed "new residents with a valid license from another state . . . to simply exchange their out-of-state license for an Alabama license" without taking a test of any kind. Pet. App. 180a-81a. And non-English reading or speaking foreigners were permitted to drive in Alabama if they had a valid license from a foreign country. Pet. App. 181a-84a. "By providing special accommodations to illiterate applicants, handicapped applicants, out-of-state drivers with valid licenses and even foreign nationals with valid licenses, Alabama single[d] out resident non-English speaking applicants by requiring them to take their examinations in English only, without the aid of interpreters or translation aids." Pet. App. 185a.

Approximately eight months after the Department adopted its English-only rule, the Department's General Counsel drafted for the Alabama Attorney General a proposed opinion regarding the new policy. Pet. App. 60a-61a, 174a. The Department's apparent purpose was "to protect its legal interests as opposed to instituting a genuine review of its Policy." Pet. App. 174a n.60. The opinion "acknowledged that the Department's English-Only Policy 'might be a violation of Title VI of the Civil Rights Act of 1964'," Pet. App. 61a, citing this Court's opinion in *Lau v. Nichols*, 414 U.S. 563 (1974), *see* J.A. at 29 n.1. But the draft opinion asserted that considerations of "safety and the integrity of the licensing process would support a requirement that driver license examinations be given in English." Pet. App. 173a (citation omitted). High ranking officials within the Attorney General's office criticized the proposed opinion, one noting that "Alabama utilizes 'international highway signs and shapes. Therefore safety is not such an issue . . . . Some accommodation needs to be made.' . . . Nevertheless, the Attorney General signed the Opinion." Pet. App. 61a; *see* Pet. App. 174a.

Martha Sandoval is a permanent U.S. resident who both cleans homes and works at a restaurant and store that she owns with her husband; she filed this class action lawsuit in 1996. J.A. 1; Pet. App. 191a-92a. Mrs. Sandoval came to this country from Mexico in 1987. Although Spanish is her native tongue, she speaks and understands some English —

she can understand Alabama road-signs[1] and English phrases like "stop" or "turn right." Pet. App. 191a. But she is not sufficiently fluent in English to pass the Department's English-language driver's test, which is written at the tenth grade level. Pet. App. 191a-93a; *see* Pl. Tr. Ex. 15 at 3.[2] In her complaint, Mrs. Sandoval alleged, inter alia, that the Department's new English-only policy had an unjustified discriminatory effect on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d - 2000d-1, and its implementing regulations.

After a bench trial, the district ruled that the Department's English-only policy violates Title VI of the Civil Rights Act of 1964. Pet. App. 252a. First, the district court held that the Department was subject to Title VI and its implementing regulations because it "receives millions of dollars in federal funds every year" from the Departments of Transportation and Justice and has promised, as a condition of receiving the money, "to comply with federal non-discrimination statutes and regulations." Pet. App. 76a, 129a; *see* Pet. App. 142a.[3] Second, the district court ruled that the Department's English-only policy had a substantial

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1 "Alabama utilizes international traffic signals that enable comprehension with little or no understanding of the English language." Pet. App. 237a n.85.

2 The District Court concluded that immigrants like Mrs. Sandoval who come to the United States as adults have particular difficulty learning English to the level of proficiency required by such an examination, App. 187a-188a, and that the denial of driver's licenses to such immigrants actually "'retards the learning of English'" and "'jeopardizes the assimilation of limited and non-English speaking persons into the community'" by tending to cut them off from "'normal interactions with English speakers in the community at large.'" Pet. App. 240a, 246a (citations omitted).

3 Regulations issued by both the Transportation and Justice Departments prohibit recipients of federal financial assistance from "utiliz[ing] criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color or national origin." 49 C.F.R. § 21.5(b)(2)(DOT); *accord* 28 C.F.R. § 42.104(b)(2)(DOJ)("individuals" rather than "persons"); *see* Pet. App. 77a-78a n.13 (citing regulations).

discriminatory effect on the basis of national origin. *See* Pet. App. 185a-204a.[4] Third, the district court found that the Department did not have a legitimate justification for its policy, concluding that the proffered explanations were both pretextual and baseless. Pet. App. 205a-46a.

The court of appeals affirmed, emphasizing that the Department did "not contest any of the district court's findings of fact - either as to the disparate impact of the policy on non-English speaking license applicants or the pretextual nature of the policy justifications offered by the State." Pet. App. 49a. The court held that "Title VI creates an implied private cause of action to obtain injunctive and declaratory relief under federal regulations prohibiting disparate impact discrimination." Pet. App. 57a.

B. The Petitioners' Statement

In the court of appeals, the petitioners did not contest any of the district court's factual determinations. Pet. App. 49a. But in this Court, they have disputed two of those findings.

First, the petitioners now claim that Alabama's restrictive practices are generally utilized by other states; "[b]e it the privilege of obtaining a driver's license . . . [or other privileges of participating in government functions], the state . . . governments have conditioned these benefits on proficiency in a common language." Pet. Br. at 3. But the district court found that, to the contrary, forty-eight states and the District of Columbia in fact accommodate persons who do not read English, either by giving their examinations in foreign languages or by allowing applicants to use interpreters or translation aids. Pet. App. 58a, 167a n.52 (discussing

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[4] The district court did not rule that "language could be equated to national origin," as petitioners suggest. Pet. Br. at 14. Instead, the court recognized that the "correct analysis . . . is not whether language equals national origin, but whether the policy of the Department, (here the policy based on language) has an unjustified disparate impact on the basis of national origin." Pet. App. 157a. The court's finding of disparate impact was based on record evidence. Pet. App. 185a-204a.

uncontested survey evidence), 207a n.78.[5] Although petitioners in their brief include a lengthy appendix citing 799 state statutes, none of these provisions requires applicants to take a driver's license examination in English.[6]

Second, petitioners in this Court assert that safety and administrative concerns were, in fact, the motives behind the 1991 decision to adopt the Department's new English-only rule.[7] The district court made detailed findings to the contrary. The court emphasized that the passage of Amendment 509 was in fact the "sole justification" for the English-only rule and that the rule was not supported by "*any* evidence that non-English speakers were a higher safety risk or that non-English speakers compromised examination integrity." Pet. App. 61a (emphasis in original); 205a; *see* Pet. App. 208a-18a (safety rationale proffered at trial without evidentiary support and riddled with inconsistencies[8]); Pet.

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[5] The only state other than Alabama that did not do so at the time of trial— West Virginia - has since begun to offer foreign language versions of its driver's license examination. *See* Phillip Rawls, *Appeals Court Agrees Alabama Can't Have English-Only Test*, Associated Press, Dec. 1, 1999, *available in* LEXIS News Library.

[6] Five states require that license applicants be able to understand English road signs. Petr. Br. App. A-17, 21, 25, 27, 49. Of course Mrs. Sandoval, like many people who could not pass a test requiring tenth-grade level English, can do that. Pet. App. 191a, 193a; Pl. Tr. Ex. 15 at 6-7; Tr. 214-16.

[7] Pet. Br. at 6-7 (denying licenses to non-English speakers "had the virtue of advancing public safety"; use of translated examinations, "*it was . . . determined*, was difficult to administer"; the state "*found* it difficult to identify a principled way for offering examinations in some languages but not in others")(emphasis added).

[8] *E.g.*, Pet. App. 213a ("Defendants fail to address why their same safety concerns are not raised when it comes to Alabama's illiterate . . . population. No matter what language they speak, illiterates, by definition, cannot read. Therefore, illiterate English speakers, like *some* non-English speakers, cannot read road signs. In fact . . . a higher percentage of Alabama's driving-age population are illiterate than are non-English speaking.")(emphasis added). Alabama will give a driver's license to an English-speaking illiterate who cannot read road signs, but not to a literate Spanish-speaking applicant who can.

App. 218a-33a (rejecting justifications based on alleged administrative difficulties and concerns over examination integrity in light of, among other things, the Department's long history of successfully administering test in foreign languages). Petitioners assert that obtaining translations was "potentially expensive" (Pet. Br. 7); the district court found, to the contrary, that the Department had in fact been able to obtain translations "at no cost." Pet. App. 39a.

Petitioners suggest that their policy is consonant with the federal requirement that naturalized citizens be able to read English. (Pet. Br. at 3). But federal naturalization law requires English literacy only at the elementary school level,[9] not the tenth grade level required for the Alabama test, and exempts from even that requirement older immigrants who have lived in the country for many years. 8 U.S.C. § 1423(b)(2). Federal law permits immigrants who cannot read English at all to become permanent residents. There is, at the least, considerable tension between federal immigration and naturalization laws and the Alabama practice of denying driver's licenses to legal immigrants and naturalized citizens who are not fluent in English.

SUMMARY OF ARGUMENT

This Court has long recognized the existence of an implied cause of action to enforce Title VI. *Guardians Ass'n v. Civil Service Commission, N.Y.C.*, 463 U.S. 582 (1983); *see Cannon v. University of Chicago*, 441 U.S. 677 (1979)(Title IX). That cause of action has been characterized broadly by this Court, and has not been limited to claims involving a violation of section 601 alone.

Since *Guardians*, the Court has repeatedly considered and resolved on the merits regulation-based claims arising under Tile VI or under the similarly worded provisions of Title IX and section 504. *E.g.*, *Bazemore v. Friday*, 478 U.S. 385 (1986)(Title VI); *Alexander v. Choate*, 469 U.S. 287 (1985)(section 504); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999)(Title IX). For three decades, the

[9] 8 U.S.C. § 1423(a)(1); 8 C.F.R. § 312.1(c)(2).

lower courts, like this Court, have been adjudicating such regulation-based claims. *See* Appendices A and B. "This Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication." *Cannon*, 441 U.S. at 706 n.41.

Where a cause of action exists to redress violations of a statute, this Court sensibly has assumed that regulations which implement that statute may also be enforced in that manner. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). That assumption is particularly appropriate where, as here, the regulations are an essential part of the statutory scheme.

The provisions of section 602 do not compel a contrary result. This Court has repeatedly rejected arguments that those provisions bar recognition of an implied cause of action or require some form of exhaustion. Those provisions, most of which expressly apply only to fund terminations, were adopted solely to constrain the use of agency power. This Court has already recognized that Congress did not intend those limitations to apply to private actions. *Cannon*, 441 U.S. at 712 n.49.

Anomalous results would follow if private plaintiffs could enforce only section 601, but not the Title VI regulations. A plaintiff who alleged a violation of both section 601 and the regulations would have to divide his or her claims, bringing suit to enforce section 601 while complaining to a federal agency about the violation of the regulations. Federal courts would utilize different legal standards depending on whether a civil action was brought by the United States, which could enforce the regulation, or by a private plaintiff, who could not. Because 601 itself embodies a constitutional standard, this distinction would require the federal courts to reach constitutional questions in order to decide a claim that could otherwise be determined on the basis of the regulation. *Cf. Ashwander v. TVA*, 297 U.S. 288, 347 (1936).

The decisions of this Court neither compel nor support a requirement that Spending Clause legislation state explicitly that recipients can be sued by private parties for violations of funding conditions. Any such requirement would be inconsistent with this Court's prior decisions that there is an

implied cause of action under both Title VI and Title IX. The contention advanced by petitioners does not provide a basis for distinguishing between a private cause of action to enforce section 601 and a private cause of action to enforce the Title VI regulations. That contention, rather, is an argument that, if accepted, would require the Court to overrule *Guardians* and *Cannon*.

ARGUMENT

I. THE QUESTION PRESENTED IS LIMITED TO WHETHER AN IMPLIED CAUSE OF ACTION EXISTS TO ENFORCE THE TITLE VI DISPARATE IMPACT REGULATIONS

For almost four decades, statutes forbidding discrimination in federally assisted programs or activities have been a mainstay of national civil rights policy. The first such statute, Title VI of the Civil Rights Act of 1964, prohibits discrimination on the basis of race, color or national origin in any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d. Title IX of the Education Act Amendments of 1972 forbids discrimination on the basis of sex in any education program or activity receiving federal assistance. 20 U.S.C. § 1681. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in any federally assisted project. 29 U.S.C. § 794. The substantive terms of these statutes, as well as their provisions mandating implementing regulations, are essentially identical.

Since *Cannon v. University of Chicago*, 441 U.S. 677 (1979), it has been clear that an implied cause of action exists under these statutes for victims of unlawful discrimination. The question presented by the instant case stems from the fact that under Title VI (as is true of Title IX and section 504), the obligations imposed on recipients of federal funds derive from two interrelated provisions of the statute. First, section 601 provides in general language:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Second, section 602 directs federal agencies to issue "rules, regulations, or orders of general applicability" to "effectuate" section 601. 42 U.S.C. § 2000d-1. As mandated by Title VI, numerous agencies, including in this case the Departments of Justice and Transportation, have issued such regulations. In terms significantly more specific than section 601 itself, these Title VI implementing regulations spell out, inter alia, what types of practices are forbidden and require certain prophylactic steps designed to prevent the occurrence of the prohibited practices. *See* 28 C.F.R. §§ 42.101-42.415.

The decisions of this Court leave no doubt that the obligations imposed by section 601 can be enforced in a private action. The sole question now before the Court is whether the legal obligations imposed on federal funding recipients by the Title VI regulations can also be enforced by private litigants.

In their brief, however, petitioners present detailed arguments that address other issues. They contend at length that the Title VI regulations at issue are invalid (Pet. Br. at 5, 26-27, 30-32, 45). They insist that the regulations do not ever (or could not validly) apply to English-only practices (*id.* at 5, 9, 37, 41-42), and that, in any event, the regulations were not properly applied in the instant case. (*Id.* at 3).

None of these issues is properly before the Court. The Question Presented in the petition for certiorari was limited to the availability of an implied cause of action under the Title VI regulations. The petition itself addressed only the propriety of review by this Court of that specific issue. The petition expressly noted that the validity of the Title VI regulations applied in this case had been upheld by a majority of this Court in *Guardians Ass'n v. Civil Service Commission, N.Y.C.*, 463 U.S. 582 (1983). (Pet. at 15).

Rule 24.1(a) of this Court provides that the brief for petitioners "may not raise additional questions or change the substance of the questions already presented." Petitioners do

not contend that any of the additional issues addressed in their brief are within the scope of the Question Presented; clearly they are not. In this instance, there is little chance the Court would have granted review of any of the additional issues; in the court of appeals, for example, petitioners did not challenge the validity of the Title VI discriminatory effects regulations. Circumvention of Rule 24.1(a) would undermine the Court's ability to control at the certiorari stage the issues it will hear and would deny respondents the opportunity to address the certworthiness of a question. *See Yee v. City of Escondido*, 503 U.S. 519, 536 (1992)(construing Rule 14.1(a)). "The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

The legal questions raised in a wide variety of different contexts by English-only requirements are complex and fact-specific. The number of amicus briefs that have been filed in this case addressing those issues amply attests to the considerable controversy provoked by these disputes. But the merits of these issues are not before the Court in the instant case. The question presented here is the narrow one of whether the obligations imposed by the Title VI regulations—whatever they may be—can be enforced through a private cause of action.

II. THE DECISIONS OF THIS COURT SUPPORT AN IMPLIED CAUSE OF ACTION TO ENFORCE THE TITLE VI DISCRIMINATORY EFFECTS REGULATIONS

A. An Implied Cause of Action Exists under Title VI

The existence of an implied cause of action under Title VI was definitively resolved by this Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Guardians Ass'n v. Civil Service Commission, N.Y.C.*, 463 U.S. 582 (1983).

The specific issue before this Court in *Cannon* was whether an implied cause of action exists under Title IX. As the Court noted, the language of Title IX was taken virtually verbatim from the earlier provisions of Title VI. 441 U.S. at 695. In holding that Title IX provides for a private right of action, the Court repeatedly emphasized the similarities between Title VI and Title IX,[10] and relied heavily on the terms and legislative history of Title VI.[11] *See also National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467 (1999)("in *Cannon* . . . we concluded that Congress had intended to authorize a private right of action even though it failed to do so expressly").

Four years later in *Guardians*, six members of the Court agreed that a cause of action indeed exists under Title VI itself. Justice White, joined by then-Justice Rehnquist, concluded that the availability of a cause of action under Title VI was controlled by *Cannon*. He noted that four members of the Court had earlier concluded in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), that such a cause of action existed under Title VI. *Guardians*, 463 U.S. at 594.[12] That plurality became a majority in *Cannon*. Justice White explained:

> A major part of the [Court's] analysis [in *Cannon*] was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended similar remedies to be available under Title IX. . . . Furthermore, it was the unmistakable thrust of the *Cannon* Court's opinion that the congressional view was correct as to the availability of private actions to enforce Title VI.

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[10] 441 U.S. at 694, 704, 708 n.42, 709.

[11] 441 U.S. 685-86 n.6, 687 n.8, 693-94 n.14, 699, 700-01 and nn.27-30, 702 and n.33, 705 n.38, 707 n.41, 711-16 and nn.48-52.

[12] *See Bakke*, 438 U.S. at 419-421, 420 n. 28 (Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, J.J.).

Id. at 594. Justice Stevens, joined by Justices Brennan and Blackmun, likewise insisted in a separate opinion "that Title VI, as well as the comparable provisions of Title IX . . . , may be enforced in a private action against recipients of federal funds." *Id.* at 635. Finally, Justice Marshall maintained "that a court has broad discretion to remedy violations of Title VI in actions brought by private parties," *id.* at 634, explaining that such relief "constitutes a 'necessary supplement' to the administrative enforcement mechanism contained in Title VI." *Id.* at 626. Since *Cannon* and *Guardians*, the availability of an implied cause of action under Title VI and its analogues has remained unquestioned.[13]

The characterization in *Guardians* and *Cannon* of the cause of action recognized by those decisions is not limited to the enforcement of the obligations and rights in section 601. Rather, those decisions describe the cause of action in broad terms as arising "under Title VI"[14] and as being available to "enforce Title VI."[15] *Cannon* also characterizes Title VI and Title IX as creating "a private right of action for the victims of illegal discrimination," 441 U.S. at 703; nothing in that phrasing suggests the illegality would be limited to violations of section 601, as opposed to violations of Title VI regulations which have the force of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). Because the plaintiffs in

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[13] *See Lane v. Pena*, 518 U.S. 187, 196 (1996); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 & n.7 (1984).

[14] *Guardians*, 463 U.S. at 593, 594; *see id.* at 608 (Powell, J. concurring)(disputing existence of an implied cause of action "under Title VI"); *Cannon*, 441 U.S. at 687, 703, 706 n.40, 709 (implied cause of action "under Title IX"); *Bakke*, 265 U.S. at 281-84 (Powell, J.)(assuming without deciding the existence of an implied cause of action "under Title VI"), 328 (opinion of Brennan, White, Marshall and Blackmun, J.J.)(same), 419 (opinion of Justices Stevens, Stewart, Rehnquist, J.J. and Burger, C.J.); *see Davis v.Monroe County Bd. of Educ.*, 119 S.Ct. 1661, 1669 (1999)("This Court has indeed recognized an implied private right of action under Title IX."); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69, 70 (1992).

[15] *Guardians*, 463 U.S. at 594 (White, J.), 635 n.1 (Stevens J., dissenting); *Cannon*, 441 U.S. at 699, 702 n.33; *Franklin*, 503 U.S. at 65.

Guardians had actually asserted a claim under the Title VI regulations, and the earlier opinions in *Bakke* and *Lau v. Nichols*, 414 U.S. 563 (1974), had also rested in part on those regulations, the broad characterization in *Cannon* and *Guardians* of the available cause of action was undoubtedly deliberate. The broad language of *Guardians* and *Cannon* tracks the wording of the Civil Rights Attorney's Fees Awards Act of 1976, which authorizes fees for actions "to enforce . . . Title VI" as a whole, rather than applying only to violations of section 601. 42 U.S.C. § 1988(b). Imposition of the limitation proposed by petitioners would require this Court to ignore the actual language of *Guardians* and *Cannon*, and to read those opinions as if they instead referred solely to a cause of action "under section 601" to redress "violations of section 601."

B. This Court Has Repeatedly Assumed That Obligations under the Title VI Regulations Can Be Enforced in a Private Action

On a number of past occasions, litigants in this Court have presented, and this Court has not hesitated to resolve on the merits, claims under the Title VI regulations or under regulations issued pursuant to section 504 and Title IX.

Three years after *Guardians*, this Court in *Bazemore v. Friday*, 478 U.S. 385 (1986), decided a discrimination claim squarely based on a Title VI regulation. The petitioners in that case contended that North Carolina officials, in operating the state's federally assisted 4-H Clubs, had failed to desegregate those clubs in the manner required by Department of Agriculture regulations. In rejecting that claim, the Court held "for the reasons stated in the opinion of Justice White, that neither the Constitution nor the applicable Department of Agriculture regulations require more than what the . . . [state] has done . . . ." *Id.* at 387 (per curiam). Both the concurring

opinion of Justice White,[16] joined by four other members of the Court, and the dissenting opinion of Justice Brennan,[17] expressly addressed the merits of the petitioners' regulation-based claim.[18]

Bazemore's resolution of the merits of a regulation-based claim was consistent with the Court's similar action nine years before *Guardians* in *Lau v. Nichols*, 414 U.S. 563 (1974). *Cannon* described *Lau* as premised on an "implicit . . . assumption that . . . Title VI . . . created a private right of action." 441 U.S. at 702-03; *see id.* at 702 n.33. The merits of the decision in *Lau* rested squarely on the applicable federal regulation.

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[16] 478 U.S. at 408-09 ("Petitioners rely on the Department of Agriculture regulation requiring the [Agricultural Extension] Service to take 'affirmative action' to overcome the effects of prior discrimination in its programs. But the Service has taken affirmative action to change its policy . . . and it is the position of the United States and the federal parties that there has been full compliance with the regulation. In view of the deference due the Department's interpretation of its own regulation, we cannot accept petitioner's submission that the regulation has been violated.").

[17] 478 U.S. at 413-14 ("Respondents have never attempted to explain . . . how they are in compliance with this regulation, although they do not challenge its application to them. . . . The Court . . . dismisses the regulation in a paragraph asserting that a mere change in policy constitutes affirmative action. I disagree.").

[18] This Court's decision in *United States v. Fordice*, 505 U.S. 717 (1992), does not hold or intimate that the Title VI disparate regulations are not enforceable in a private action. To the contrary, this Court specifically criticized the lower court for having failed to heed the manner in which *Bazemore* had analyzed a similar regulation-based claim in that case. *Id.* at 732 n.7.

The regulation at issue in *Fordice* was not the provision regarding disparate impact, but a regulation requiring "affirmative action" where past intentional discrimination had been proven. 34 C.F.R. § 100.3(b)(6)(i). That is the same regulation that was applied in *Bazemore*. The footnote in *Fordice* merely held, as did the majority in *Bazemore*, that that regulation had not been violated. *Bazemore* assumed that the corrective action required by that regulation is the same as is required by the Constitution.

> By § 602 of the Act HEW is authorized to issue rules, regulations and orders . . . HEW's regulations . . . specify that . . . . [d]iscrimination is barred which has [a discriminatory] effect even though no purposeful design is present . . . .[45 C.F.R.] § 80.3(b)(2).
>
> It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination *banned by the regulations*. . . .
>
> Respondent school district contractually agreed to "comply with . . . all requirements imposed by or pursuant to the Regulation" of HEW . . . .

Id. at 567-69 (citation omitted) (emphasis added).[19] Justice Stewart's concurring opinion relied expressly on regulations that had been issued by HEW pursuant to section 602, noting that it was unclear whether "§ 601 . . . standing alone" would forbid the practices in question. *Id.* at 570-71.

Similarly, this Court has repeatedly entertained and resolved on the merits private actions based on the regulations issued pursuant to section 504 of the Rehabilitation Act of 1973. In *Alexander v. Choate*, 469 U.S. 287 (1985), the plaintiff challenged a state imposed reduction in the number of days of hospital care provided under Medicaid, contending that that limitation had a disparate impact on the disabled. The plaintiff asserted, and this Court expressly resolved,

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[19] The Court's analysis of the merits of the case begins with the statement that "[w]e do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964 . . . ." 414 U.S. at 566. This does not mean, as petitioners suggest, that the majority opinion does not rest on the Title VI regulation. To the contrary, the only explanation contained in the opinion for the result is an analysis of the HEW regulation that effectuates section 601. The quoted passage was intended to emphasize only that the Court was not relying on the constitutional argument, not that it was disregarding the implementing regulation.

claims under the § 504 regulations as well as under the statute itself.

> The question presented is whether the effect upon the handicapped that this reduction will have is cognizable under § 504 of the Rehabilitation Act of 1973 *or its implementing regulations*. We hold that it is not.[20]

The Court's determination of the regulation-based claim rested on a careful parsing of the terms of the applicable regulations.

> Regulations promulgated by the Department of Health and Human Services . . . . prohibit a recipient of federal funding from adopting "criteria or methods of administration that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to the handicapped." 45 C.F.R. § 84.4(b)(4)(ii)(1984).
>
> While these regulations, read in isolation, could be taken to suggest that a state Medicaid program must make the handicapped as healthy as the nonhandicapped, . . . 45 C.F.R. § 84.4(b)(2) . . . makes clear that Tennessee is not required to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users.

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20 469 U.S. at 289 (emphasis added); *see id.* at 294 n.10, 309.

469 U.S. at 304-06.[21] *Alexander* read the result in *Guardians* as meaning that discriminatory effects regulations were enforceable in private actions.[22]

School Board v. Arline, 480 U.S. 289 (1987), sustained the sufficiency of the plaintiff's complaint alleging discrimination on the basis of disability; the Court explained that "our holding is premised on the plain language of the Act, and on the detailed regulations that implement it." *Id.* at 286 n.15. The Court held that Arline "had a physical impairment as that term is defined by the regulation, since she had a 'physiological disorder or condition . . . affecting [her] respiratory [system].' 45 C.F.R. § 84.3(j)(2)(i)(1985)." *Id.* at 281. The Court remanded the case for a determination of whether Arline was "otherwise qualified" for her job, explaining that "[i]n the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question. 45 C.F.R. § 64.3(k)." *Id.* at 288 n.17. The lower court was also directed to decide whether the school board could have "reasonably accommodated" Arline, an issue defined in and derived from the applicable federal regulations. *Id.* at 288 n.17. Virtually the entire analysis in *Arline* was grounded in regulation-based concepts, terminology and requirements, none of which could be found on the face of section 504 itself.

Finally, in *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999), the plaintiff relied on both Title IX and

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21 *See* 469 U.S. at 307-08 n.32 ("the current regulations are drafted in far too broad terms to permit the conclusion that state Medicaid programs must always choose, from among various otherwise legitimate benefit and service options, the particular option most favorable, or least disadvantageous, to the handicapped"), 308 (rejecting requirement of equal benefit for individuals with plaintiffs' handicap because they could "offer no reason that similar treatment would not have to be accorded other groups protected by statute or regulation from disparate-impact discrimination").

22 469 U.S. at 294 (1985) ("*Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make *actionable* the disparate impact challenged in this case" (emphasis added)).

Department of Education regulations in seeking to establish that the defendant was subject to the restrictions of Title IX. After rejecting Smith's statutory argument, the Court dealt separately with the merits of her regulation-based contention.

> The Third Circuit interpreted the Department's regulation to . . . extend[] Title IX to beneficiaries of federal funding as well as recipients. . . . The Third Circuit's reading of [34 C.F.R.] § 106.2(h) failed to give effect to the regulation in its entirety.

525 U.S. at 468.

Like this Court, the lower courts since *Lau* have repeatedly entertained and resolved on the merits claims arising under the Title VI, Title IX and section 504 regulations. *See* Appendices A and B. "This Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication." *Cannon*, 441 U.S. at 706 n.40.[23]

III. AN IMPLIED CAUSE OF ACTION SHOULD BE RECOGNIZED TO REDRESS VIOLATIONS OF TITLE VI REGULATIONS THAT CREATE RIGHTS FOR A SPECIFIC CLASS OF PERSONS

Congress authorizes the promulgation of implementing regulations where it concludes that the creation and enforcement of those regulations are important to the effective administration of the statute itself. Having in Title VI both enacted a statutory requirement and authorized—indeed required—implementing regulations, it is unlikely that Congress would have contemplated that only the former could be enforced in a private civil action.

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[23] *Cannon* emphasized that prior to the adoption of Title IX the lower courts were in agreement that an implied cause of action existed under Title VI. 441 U.S. at 696. In one of the cases cited in *Cannon* at note 21, the plaintiffs had in fact successfully asserted a claim under a Title VI discriminatory effects regulation. *See Blackshear Residents Org. v. Housing Auth.*, 347 F.Supp. 1138, 1146-48 (W.D.Tex. 1972).

A. Enforcement Through an Implied Cause of Action Is as Appropriate for a Regulation as for a Statute

Nothing in the state of the law when Title VI was adopted suggests that Congress would have intended or even anticipated any distinction between private enforcement of the statute and private enforcement of its implementing regulations. The then-reigning decision of this Court regarding implied causes of action, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), treated as a single question the availability of a private cause of action under section 14(a) of the Securities Exchange Act and the availability of such a cause of action to enforce the SEC Rules that had been issued under that section.[24] By 1964, the federal courts had widely recognized an implied cause of action to enforce SEC Rule 10b-5, a mainstay of federal securities litigation. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380-81 n.10 (1983); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). In this era as well, "the federal courts routinely and consistently had recognized an implied private cause of action . . . for violations of the [1936 Commodities Exchange Act] or rules and regulations

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[24] Respondent alleged a violation of section 14(a) of the Act and of Rule 14a-9. The Court's decision drew no distinction between the statute and the Rule.

> [P]etitioners . . . emphasiz[e] that Congress made no specific reference to a private right of action in § 14(a) . . . .[W]e believe that a right of action exists . . . . While [the statutory] language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result. . . . Private enforcement of the proxy rules provides a necessary supplement to Commission action. . . . [T]he possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements.

377 U.S. at 431-32.

In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1084 (1991), this Court characterized *J.I. Case* as recognizing "an implied private right of action for the breach of § 14(a) *as implemented* by SEC Rule 14a-9." *Id.* at 1086-87 (emphasis added).

promulgated pursuant to the statute." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982).

It is difficult to believe that Congress in 1964 could have anticipated a distinction which was then largely if not entirely unknown to the law. Petitioners do not identify any decision by this Court—prior to or since 1964—that draws a distinction between private civil enforcement of a statute and private enforcement of that statute's implementing regulations.

It has long been a pillar of administrative law that duly authorized regulations have "the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). The decisions of this Court have repeatedly rejected suggestions that the commands embodied in regulations be accorded a lesser status, or be enforced in a different manner, than the provisions of statutes. *See Geier v. American Honda Motor Co.*, 120 S.Ct. 1913, 1917-18 (2000)(state law pre-empted where it "actually conflict[s] with [a regulation], hence with the Act itself"); *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431 (1987)(federal "laws" enforceable against state officials under section 1983 can include regulations); *United States v. Mersky*, 361 U.S. 431, 434-38 (1960)(law authorizing the interlocutory appeal of dismissal of an indictment based on the "construction of the statute" encompasses an appeal regarding interpretation of a regulation issued under a statute).

Under the Rules of Decision Act, the federal courts are bound to apply state law "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." 28 U.S.C. § 1652. This Court has never doubted that this exception encompasses provisions of the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure promulgated under—but not, of course, contained in—the Rules Enabling Act, 28 U.S.C. § 2072.[25]

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[25] *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1 (1987)(Fed. R. App. P. 38); *Hanna v. Plumer*, 380 U.S. 460 (1965)(Fed. R. Civ. P. 4); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)(Fed. R. Civ. P. 35).

B. Congress Regarded Enforcement of the Title VI Regulations as Essential to the Overall Statutory Scheme

Congress attached particular importance to the role of regulations in the implementation of Title VI. Federal agencies are not only authorized but "directed" to issue regulations "to effectuate the provisions" of section 601. The statute contemplates that these regulations will contain "requirement[s]," not merely internal operating procedures, and provides that the regulations must be "approved by the President."

The central role attached to the regulations is understandable in light of the state of civil rights in 1964, particularly regarding discrimination in southern schools receiving federal assistance, a principal focus of the debates on Title VI. Ten years after *Brown v. Board of Education*, 347 U.S. 483 (1954), the vast majority of the public schools in the south remained all white or all black. Southern officials had resorted to a combination of defiance and artful stratagems to preserve segregation; a self-proclaimed attitude of "massive resistance" had frequently frustrated the federal courts, black students and their parents. Since the decision in *Brown*, almost a generation of black children had gone through the public schools in the south without ever attending an integrated class.

In this context, regulations were essential to serve two distinct purposes. First, by formulating detailed non-discrimination requirements, the federal agencies could thwart known schemes of evasion and preempt new tactics. In 1965, many federal agencies took just such prompt action, giving sufficient detail to the general prohibition against discrimination to thwart and deter efforts to circumvent Title VI. Although the substantive prohibition contained in section 601 consists of but a single sentence, the Title VI regulations of the Departments of Justice and Transportation, like those of several dozen other agencies, run to several pages each.

Second, the issuance of regulations permitted the federal government to deal at once with the emerging and evolving problems of discrimination, rather than waiting for years or

decades while the lower courts, and ultimately this Court, struggled with a wide variety of often unforeseeable constitutional disputes about the scope of the Equal Protection Clause. In 1964, Congress correctly anticipated that considerable delay would ensue before a definitive resolution of those issues; key constitutional decisions were still in the then distant future. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Washington v. Davis*, 426 U.S. 229 (1976); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). In this context, individuals who could not enforce the mandated regulations would have faced precisely the uncertainty and protracted legal disputes that the regulations were intended to avoid.

C. The Administrative Limitations in Section 602 Do Not Provide a Basis for Rejecting Private Enforcement of the Title VI Obligations and Rights Arising under That Section

(1) Petitioners contend that allowing private enforcement of Title VI regulations will result in the circumvention of the limitations on agency action set out in section 602. (Pet. Br. at 28). That argument against a private cause of action is not new. It has on repeated occasions been made to, and rejected by, this Court.

In *University of California Regents v. Bakke*, 438 U.S. 265 (1978), the defendants specifically argued that section 602 precluded a private cause of action because the federal agency concerned had not taken the steps which, under section 602, were prerequisites to agency enforcement.[26] Justice White's separate opinion in *Bakke* would have rejected any implied cause of action under Title VI precisely because of his view that such a private action would "short circuit the procedural preconditions provided in Title VI. . . . [I]t is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites." *Id.* at 383; *see id.* at 383 n.2, 385. The opinions of Justice Stevens, Stewart, Rehnquist and the Chief Justice, which concluded that an implied cause

[26] Supplemental Brief for Petitioner at 62-64, *Bakke* (No. 76-811).

of action existed under Title VI, expressly rejected this argument.[27]

In *Cannon*, the court of appeals, in refusing to imply a private cause of action under Title IX, had expressly relied on the language of Title IX identical to section 602. Referring to 20 U.S.C. § 1682, the Seventh Circuit reasoned:

> The statute encourages voluntary compliance in the first instance, an opportunity for an administrative hearing on the issue of discrimination if necessary, and the withdrawal of federal funds as a last resort . . . . It is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act.

559 F.2d 1063, 1073 (7th Cir. 1977); *see id.* at 1081, 1082. In this Court, the defendant urged that an administrative complaint was the plaintiff's exclusive remedy.[28] The United States argued, to the contrary, that private actions "would effectively complement the administrative enforcement mechanism provided under the statute."[29] In his dissenting opinion in *Cannon*, Justice White again emphasized the procedural prerequisites in section 602 and the comparable provision of Title IX; insisting that administrative action was the intended enforcement mechanism, he objected that the implied cause of action "entirely displaces that scheme in

[27] 438 U.S. at 420 n.26 (Stevens, J., concurring in part, dissenting in part).

[28] Brief for Respondents at 19, 37, 38, *Cannon* (No. 77-926)("the doctrine of exhaustion militates against the implication of a private right of action").

[29] Brief for Federal Respondents at 14, *Cannon* (No. 77-926)("The existence of a right to challenge Title IX violations in private suits would greatly encourage voluntary compliance with the statute's ban on sex discrimination in federally financed education programs.").

favor of a different approach." 441 U.S. at 729; *see id.* at 721. The majority in *Cannon* rejected this contention.[30]

In *Guardians* the defendant reiterated this twice rejected argument, citing Justice White's opinion in *Bakke* and insisting that a private remedy under Title VI was inconsistent with "Title VI's sole emphasis on administrative enforcement (section 2000d-1)."[31] Justice Powell argued that the existence of the section 602 administrative enforcement provisions was inconsistent with any implied cause of action under Title VI. 463 U.S. at 609-10 & nn. 2 and 3. But a majority of the Court was again unpersuaded by these arguments.

In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), this Court expressly resolved in the context of Title IX the relationship between an implied cause of action and the notice and determination clause of that statute. The Court concluded that the existence of an implied cause of action was consistent with that clause, but that the clause mandated certain limitations on the circumstances in which a private plaintiff could obtain damages:

> [A] central purpose of requiring notice of the violation "to the appropriate person" and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures. . .
>
> It would be unsound, we think, for a statute's *express* system of enforcement to require notice to

30 441 U.S. at 707 n.41 ("It has been suggested that, at least in the absence of an exhaustion requirement, private litigation will interfere with HEW's enforcement procedures under § 902 of Title IX. The simple answer to this suggestion is that the Government itself perceives no such interference under the circumstances of this case, and argues that if the possibility of interference arises in another case, appropriate action can be taken by the relevant court at that time.").

31 Brief for Respondents at 8, *Guardians* (No. 81-431).

> the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.

Id. at 289 (emphasis in original). The remedial limitation imposed by *Gebser* on private civil actions was expressly confined to claims for monetary relief. *Id.* at 290-92. Since *Guardians*, however, it has been understood that damages are not available in a suit to enforce the discriminatory effects regulations, and they were not sought here.

The fatal problem with petitioners' contention is that it proves too much. As Justice White emphasized in *Bakke* and *Cannon*, and as Justice Powell argued in *Guardians*, acceptance of that argument leads to the conclusion that an implied cause of action is never permissible under Title VI. Petitioners repeatedly advance just that contention. (Pet. Br. at 29, 37, 43). But such an argument does not provide a basis for treating Title VI regulation claims differently from section 601 claims.

(2) Most of the provisions of section 602 on which petitioners rely expressly serve only to establish preconditions that must be met before an agency terminates funding;[32] those restrictions do not apply to a civil action by the United States, and have no possible relevance here. The only prerequisites to a civil action by the United States are prior notice of the violation to "an appropriate person" and a determination by the agency that "compliance cannot be secured by voluntary means," 42 U.S.C. § 2000d-1, preconditions that also apply to fund termination. In a private civil action such as this, petitioners object, no such notice and determination has occurred.

32 There are five statutory prerequisites to termination: (a) the opportunity for a hearing, (b) an express finding on the record of a failure to comply with a section 602 requirement, (c) the issuance of a written report, (d) the filing of that report with the relevant committees of the House and Senate, and (e) a delay of thirty days after the filing of the report. 42 U.S.C. § 2000d-1

Congress, however, intended the notice and determination clause to operate as a prerequisite only to agency action. As the United States noted in its supplemental brief in *Bakke*, it is entirely understandable that Congress would establish for enforcement actions by the executive branch of the national government constraints that it did not deem necessary for private plaintiffs. "[Private actions] would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602."[33] The litigation and other enforcement resources of the federal government are usually far greater than those of a private plaintiff and carry a greater risk of overpowering an ordinary defendant. In 1964 legal disputes between federal and state or local officials about the then highly emotional issue of civil rights raised delicate issues of federal-state relations; a Congress which had witnessed a series of well publicized collisions between state and federal officials was understandably anxious to avoid such situations where possible. The enactment of Title VI was resisted by southern officials precisely because it would bring federal executive agencies into a greater role in the enforcement of civil rights, an area which prior to 1964 had depended largely on private legal actions. It is entirely understandable that Congress would choose to impose on those agencies, but not private litigants, the procedural constraints in section 602. Those requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate.[34]

Lastly, the notice and determination clause of section 602 does not provide a basis for imposing on discrimination victims an administrative exhaustion requirement. This Court expressly rejected any such requirement in *Cannon*. 441 U.S.

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[33] Supplemental Brief for the United States at 30 n.25, *Bakke*, (No. 76-811).

[34] The legislative history of Title VI reveals an understanding that the limitations in section 602 would not apply to actions by private individuals. *Cannon*, 441 U.S. at 712 n.49.

at 706 n.41.[35] The lower courts retain the discretion to solicit in any Title VI case the views or assistance of the relevant federal agency. *Cannon*, 441 U.S. at 688 n.8; *Rosado v. Wyman*, 397 U.S. 397, 406-07 (1970).

There is no reason to conclude that the availability of private actions to enforce the discriminatory effects regulations will either overwhelm the courts or wreak havoc on recipients. The availability of such private actions has been unquestioned in the lower courts for almost thirty years;[36] there is no evidence that the resulting "litigation has

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[35] If the notice and determination clause were converted into an exhaustion requirement, the resulting rule would be exceedingly strange and harsh.

An aggrieved individual would have to seek from the federal agency a finding of illegality and a determination that voluntary compliance could not succeed. The statute itself, however, contains neither a clear requirement that the agency act on such a complaint, nor any time limitation; at best complainants aggrieved by inaction or delay might have an action against the agency under the Administrative Procedure Act.

If the agency were to conclude that no violation of the law had occurred, that would be fatal to the aggrieved party; that harsh consequence would raise grave due process problems, because agency regulations accord recipients, but not discrimination victims, a right to participate in the investigation and determination process. *Cannon*, 441 U.S. at 707 n.41. If the complainant could convince the agency that there was indeed a violation, that would only open the door to a judicial proceeding against the recipient, in which the same issues would have to be relitigated.

Where, in framing the Civil Rights Act of 1964, Congress wanted to establish an exhaustion requirement, it did so expressly. Section 706 of Title VII requires victims of employment discrimination, prior to bringing a civil action, first to complain to the EEOC (or similar state agency) and afford it an opportunity to investigate and conciliate the case. But under section 706, the EEOC is obligated to make those efforts, the complainant is required to await agency action for only 180 days, and an agency finding of illegality is clearly not a prerequisite to legal action. It is exceedingly unlikely that Congress, having cabined the limited section 706 exhaustion requirement with such specific safeguards, meant silently to impose in section 602 a far more draconian, oftentimes fatal, exhaustion rule.

[36] *See, e.g., Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138, 1146 (W.D.Tex. 1972); *see* Appendices A and B.

been so costly or so voluminous that either [recipients] or the courts have been unduly burdened." *Cannon*, 441 U.S. at 709.

D. Rejection of Private Enforcement of the Title VI Regulations Would Have Anomalous Consequences

Restricting private litigation to the enforcement of section 601 itself, while permitting only federal agencies to enforce the Title VI regulations, would have peculiar collateral consequences that Congress could hardly have wanted.

Such a scheme would, over time, result in the creation under Title VI of two increasingly distinct sets of standards; enforcement by the government would apply the standards in the regulations, while in private actions a separate set of judge-made rules interpreting the statute would be utilized. Regulations designed to clarify the law would in practice only clarify the law in disputes to which the agency itself was a party. Federal judges would be compelled to reach their own, at times conflicting, answers to legal and practical issues already addressed by existing regulations. Complainants who contended that disputed actions by a recipient violated both section 601 and the Title VI regulations would be compelled to divide their claims, pursuing the section 601 claim in court[37] while asking the agency to act on the regulation-based claim.

Where the statute itself embodies a constitutional standard, the unavailability of the regulation in private actions would require the federal courts to resolve on a constitutional basis an issue that the agency had in fact resolved by regulation.[38] That is precisely the opposite of the practice

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[37] Utilization of the courts to address the section 601 claim would ordinarily be imperative, since complainants have no right to participate in agency investigations or hearings, and agencies lack the authority to provide all needed relief.

[38] The lower courts recognized long ago that by relying on the Title VI regulations to resolve a complaint they could avoid reaching constitutional issues. *E.g.*, *Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138, 1146 (W.D.Tex. 1972).

mandated by this Court's decision in *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)(Brandeis, J., concurring).

Until now, the lower courts have generally held that individuals cannot bring an action under the Administrative Procedure Act to compel federal agencies to enforce Title VI; these cases are expressly premised on the assumption that such suits would be unnecessary because the plaintiffs have a private right of action directly against the recipient engaging in discriminatory practices.[39] A scheme precluding private parties from enforcing Title VI regulations would compel the opposite conclusion, transforming what is now a regulation-based dispute between the discrimination victim and the funding recipient into a dispute between that victim and the federal agency.[40] Because suits against those agencies would be the only option open to discrimination victims barred from obtaining redress from the recipient, federal officials would have to devote resources to defending their actions (or inactions) and to assuring that the investigation and resolution of administrative complaints would withstand judicial review. Even in the absence of these pressures, agencies would legitimately feel obligated to attach a greater priority to pursuing regulation-based complaints, even those affecting only individuals, to the exclusion of investigating cases of intentional discrimination, because those complainants would simply have no other forum to which they could turn.

The unavailability of private actions to enforce the Title VI regulations would leave significant gaps in the overall enforcement structure. Although the Title VI regulations

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[39] *See, e.g., Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191-92 (4th Cir. 1999); *Washington Legal Found. v. Alexander*, 984 F. 2d 483, 485-86 (D.C.Cir. 1993); *Women's Equity Action League v. Cavasos*, 906 F.2d 742, 750-51 (D.C.Cir. 1990).

[40] "[I]f no private remedy exists, the complainant is relegated to a suit under the Administrative Procedure Act to compel the agency to investigate and cut off funds. *E.g.* , *Adams v. Richardson*, . . . 480 F. 2d 1159 (D.C. Cir.1973). But, surely this alternative is far more disruptive of HEW's efforts efficiently to allocate its enforcement resources under Title IX than a private suit against the recipient of federal aid could ever be." *Cannon*, 441 U.S. at 707 n.41.

forbid retaliation against individuals who complain or provide information to the United States about Title VI violations, 28 C.F.R. § 42.107(e), the statute itself has no such provision. Any administrative action would be palpably insufficient, because the agency administrative processes do not contain provisions for either preliminary injunctive relief or retrospective monetary awards. The absence of private enforcement would encourage recipients to interfere with Title VI complaints and would tend to obstruct agency enforcement generally. *See Lowery v. Texas A & M Univ. Sys.*, 117 F.3d 242, 254 (5th Cir. 1997)(Title IX).

The availability of a private cause of action to obtain injunctive relief is especially important because damages and back pay cannot be obtained to redress violations of the discriminatory effect regulations. Because this Court's decision in *Guardians* precludes monetary awards under the regulations, recipients of federal funds already have "little incentive to shun practices of dubious legality." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)(importance of monetary relief under Title VII). If private civil actions are not available, funding recipients will have even less incentive to comply with these regulations.[41]

Without the ability to enforce directly an applicable Title VI regulation, individuals whose rights were violated would in some instances be driven to more awkward and unpredictable methods of invoking federal law. The regulations would remain the law of the land, and could, for example, be invoked under the Supremacy Clause as a defense to a state proceeding. *See Thorpe v. Housing Auth.*, 393 U.S. 268 (1969). In the instant case, for example, if Mrs. Sandoval were denied a driver's license in violation of the Title VI regulations, she could presumably invoke those regulations if she were later prosecuted for driving without a license. But such awkward self-help measures would be

[41] Recipients understand full well that there is no possibility that violations of Title VI or its implementing regulations will ever lead to funding termination; there have been virtually no such terminations in the thirty-six years since the adoption of Title VI.

impracticable for most individuals injured by violations of the Title VI regulations.

E. The Existence of an Implied Cause of Action to Enforce the Title VI Regulations Is Consistent with the Standards of *Cort v. Ash*

Cannon v. University of Chicago applied the four-part standard of *Cort v. Ash*, 422 U.S. 66 (1975), in concluding that a cause of action exists under Title IX. Application of the *Cort* factors to a Title VI regulation claim yields the same result; indeed, the terms of the two analyses are virtually indistinguishable.

First, *Cannon* concluded that Title IX was "enacted for the benefit of a special class of which the plaintiff is a member," 441 U.S. at 689; this finding applied to Title IX as a whole, which the Court emphasized was patterned after Title VI.[42] The discriminatory effects regulations in the instant case, like many Title VI regulations, were adopted for the benefit of the same special class as was Title VI as a whole; the regulations to which Title VI commands obedience are expressly mandated "to effectuate" the statute.[43]

Second, *Cannon* noted that the legislative history of Title VI contained frequent statements assuming the existence of a private action and was devoid of "any hostility toward an implied private remedy." 441 U.S. at 711-13. These

[42] The Court reasoned that "Title IX was patterned after Title VI," 441 U.S. at 694, *not* simply that section 1681(a) was patterned after section 601.

[43] The specific regulations in this case forbid the utilization of "criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin." 49 C.F.R. § 21.5(b)(2)(DOT); *accord* 28 C.F.R. § 42.104(b)(2)(DOJ)("individuals" rather than "persons"). That express delineation of the protected individuals is precisely the sort of right-creating language that *Cannon* regarded as dispositive. 441 U.S. at 690 n.12.

legislative references to private enforcement are framed in broad terms not limited to section 601.[44]

Third, *Cannon* recognized that private lawsuits would be "at least helpful to the accomplishment of the statutory purpose." 441 U.S. at 703; *see id.* at 704. Enforcement of the Title VI regulations would, by definition, have such a salutory effect, because the regulations themselves must "effectuate the provisions" of section 601. 42 U.S.C. § 2000d-1. One of the central objectives of Title VI, like Title IX, was "to provide individual citizens effective protection." 441 U.S. at 704. As the Court explained in *Cannon*, there are many circumstances in which administrative action is unlikely to be an appropriate or practicable method of affording that protection. *Id.* at 705 & n.37. Federal agencies often lack the resources to investigate or resolve possible violations of Title VI or its implementing regulations. *Id.* at 708 n. 42. This point is as true of complaints regarding discriminatory effects forbidden by the Title VI regulations as it is of discriminatory intent prohibited by section 601.

Fourth, as in *Cannon*, the subject matter of claims arising under Title VI regulations does not involve an area that has traditionally been the exclusive province of the states. "No such problem is raised by a prohibition against invidious discrimination of any sort . . . . Since the Civil War, the Federal Government and the federal courts have been the '"primary and powerful reliances"' in protecting citizens against such discrimination." *Id.* at 708 (citation omitted).

IV. CONGRESS HAS RATIFIED AND BUILT ON THIS COURT'S DECISIONS TREATING AS ACTIONABLE CLAIMS UNDER TITLE VI, TITLE IX AND SECTION 504 REGULATIONS

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court unanimously reaffirmed its prior

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[44] *See, e.g.*, 110 Cong. Rec. 6545 (1964)(Sen. Humphrey) ("litigation by private parties"), 7067 (Sen. Ribicoff)("lawsuits to end discrimination").

decisions in *Cannon* and *Guardians*, emphasizing that those decisions had been ratified by Congress in 1986.

> In the Rehabilitation Act Amendments of 1986, . . . 42 U.S.C. § 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. This statute cannot be read except as a validation of *Cannon*'s holding.

Id. at 72. In a separate opinion, Justice Scalia agreed with this reading of the 1986 legislation.

> The Rehabilitation Act Amendments of 1986 . . . must be read, in my view, not only "as a validation of *Cannon*'s holding," . . . , but also as an implicit acknowledgement that damages are available.

Id. at 78. In reaching the conclusion that Congress intended to ratify the decision in *Cannon*, the Court in *Franklin* relied not only on the 1986 enactment of the Rehabilitation Act Amendments, but also on the passage in 1988 of the Civil Rights Restoration Act. 503 U.S. at 73. Both statutes apply to Title VI and section 504 as well as to Title IX. *See* 42 U.S.C. §§ 2000d-4a, 2000d-7. The Civil Rights Restoration Act significantly expanded the range of programs and activities covered by Title VI, and the Rehabilitation Act Amendments strengthened the remedies available in a private action.

The implied cause of action ratified by Congress in these two statutes presumptively encompasses the practice of this Court and the lower federal courts of treating as actionable regulation-based claims under Title VI, Title IX, and section 504.[45] When Congress adopted the Rehabilitation Act Amendments and the Civil Rights Restoration Act, it knew full well that the courts had consistently treated the Title VI

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[45] As the court of appeals noted, when Congress enacted the 1986 Rehabilitation Act Amendments, "[t]here is no evidence that [it] somehow differentiated between suits to enforce the statute and suits to enforce the regulations promulgated thereunder when it constructed its abrogation/waiver provision." Pet. App. 16a n.5.

regulations as creating rights that could be enforced in private actions. *Cf. United States v. Wells*, 519 U.S. 482, 496 (1997). The 1988 statute was adopted after this Court's decisions in *Lau*, *Guardians*, *Bazemore*, *Alexander*, and *Arline*, and in the wake of a number of lower court decisions enforcing regulations issued under Title VI, Title IX, and section 504. *See* Appendix A. During the four years of hearings and debates on the Civil Rights Restoration Act, opponents of the legislation relied on the fact that the regulations were privately enforceable in an effort to raise the specter that broadening the scope of Title VI would spur additional lawsuits against federal funding recipients. The Executive Branch submitted to Congress a memorandum expressly warning that if the bill were passed "every licensed attorney would be empowered to file suit to enforce the 'effects test' regulations of agencies, challenging practices in *every* aspect of *every* institution that receives *any* Federal assistance."[46]

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[46] Civil Rights Act of 1984: Hearings on S. 2586 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 527 (1984)(emphasis in original). The memorandum, prepared by the Office of Management and Budget, and submitted to Congress in response to this proposed legislation, explained that "[the bill] would . . . open all of a recipient's activities to private lawsuits over practices deemed to have 'discriminatory effects,' regardless of intent." Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong. 2d Sess. 532 (1984); *see id.* at 530 ("Any assistance to a State or city government would, for example, apply such [disparate impact regulations] to all of their licensing and professional certification procedures. As noted, bar exams, medical boards, teacher competency exams, and a host of similar standards alleged by advocacy groups to have 'discriminatory effects' would now be covered *by the existing regulations* for the first time and would be subject to agency enforcement activities *and private lawsuits*.")(second emphasis added).

Senator Hatch warned that just as federal agencies could bring administrative enforcement actions against recipients whose practices had a disparate impact on minorities, "advocacy groups will be able to bring private lawsuits making the same allegations before federal judges." 134 Cong. Rec. 4257 (1988); *see id.* at 99-100 (remarks of Sen. Hatch)(discussing enforcement of disparate impact regulations by private plaintiffs).

Despite these objections to private enforcement of the regulations issued under the civil rights statutes, Congress adopted the Restoration Act expanding the coverage of Title VI and the other statutes and adopted the Rehabilitation Act Amendments strengthening the remedies for private plaintiffs. In addition to these statutes, Congress has repeatedly amended Title VI,[47] Title IX,[48] and section 504.[49] "[T]he fact that a comprehensive reexamination and significant amendment of [an act of Congress] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress intended to preserve that remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, 456 U.S. 353, 381-82 (1982); *see Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998).

Congress also has repeatedly adopted other legislation which builds on established enforcement practices, relying for its implementation on the regulation provisions of, or

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[47] Improving America's Schools Act of 1994, sec. 392, Pub. L. No. 103-382, 108 Stat. 4026 (1994); Department of Education Organization Act, sec. 301, sec. 508, Pub. L. No. 96-88, 93 Stat. 677, 692 (1979); Amendments to the Elementary and Secondary Education Act of 1965, Pub. L. No. 91-230, 84 Stat. 121 (1970); Elementary and Secondary Education Amendments of 1967, sec. 112, Pub. L. No. 90-247, 81 Stat. 787 (1968); Elementary and Secondary Education Amendments of 1966, sec. 182, Pub. L. No. 89-750, 80 Stat. 1209 (1966).

[48] Age Discrimination in Employment Amendments of 1986, sec. 6, Pub. L. No. 99-592, 100 Stat. 3342 (1986); Department of Education Organization Act, sec. 301, Pub. L. No. 96-88, 93 Stat. 677 (1979); Education Amendments of 1976, sec. 412, Pub. L. No. 94-482, 90 Stat. 2234 (1976); Pub. L. No. 93-568, sec. 3, 88 Stat. 1862 (1974); Education Amendments of 1972, sec. 901, Pub. L. No. 92-318, 86 Stat. 373 (1972).

[49] Workforce Investment Act of 1998, sec. 408(a)(3), Pub. L. No. 105-220, 112 Stat. 1203 (1998); National Education Statistics Act of 1994, sec. 394, Pub. L. No. 103-382, 108 Stat. 4028 (1994); Rehabilitation Act Amendments of 1992, Pub. L. No.102-569, 106 Stat. 4344 (1992); Handicapped Programs Technical Amendments Act of 1988, sec. 207, Pub. L. No. 100-630, 102 Stat. 3312 (1988); Rehabilitation Act Amendments of 1986, sec. 103(d), Pub. L. No. 99-506, 100 Stat. 1810 (1986); Rehabilitation Comprehensive Services, and Development Disabilities Amendments of 1978, sec. 16, sec. 119, Pub. L. No. 95-602, 92 Stat. 2982, 2987 (1978).

provisions similar to those in, Title VI, Title IX, and section 504. *Cf. Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994). A series of enactments after *Lau* defined particular federal programs as constituting assistance under Title VI, in order to bring them within the scope of that statute and its implementing regulations.[50] From 1971 to 1992, Congress adopted nine statutes forbidding gender based discrimination in specific federally assisted programs, each of which was modeled on Title VI and its provisions for implementing regulations.[51] Part II A of the 1990 Americans With Disabilities Act, which forbids discrimination in the public services of any state or local government, mandates the issuance of regulations and incorporates by reference the enforcement mechanisms of Title VI. *See Olmstead v. L.C.*, 527 U.S. 581, 590 n.4 (1999).[52] In adopting the ADA and these earlier statutes,

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[50] 23 U.S.C. §§ 108(c)(2), 182(c)(1)(applying Title VI to Department of Transportation funds for land acquisition); 39 U.S.C. § 410(b)(6)(applying Title VI to the Postal Service); 42 U.S.C. §§ 608(d)(4)(applying Title VI to aid to needy families with children), 1437d(r)(1)(applying Title VI to assisted housing program), 1437aaa-1(c)(2)(E), 1437aaa-2(d)(2)(m)(applying Title VI to Hope for Public Housing Program), 1760(l)(4)(M)(i)(applying Title VI to school lunch program), 5057(b)(applying Title VI to domestic volunteer services program), 8013(j)(2)(applying Title VI to congregate housing program), 10406(a)(1)(applying Title VI to family violence prevention program), 11386(a)(2)(G)(applying Title VI to supportive housing program), 11394(a)(11)(applying Title VI to Safe Havens for Homeless Individuals program), 12635(b)(applying Title VI to National and Community Service program), 12872(c)(2)(E), 12873(d)(2)(m)(applying Title VI to Hope for Homeownership of Multifamily Dwellings program), 12892(c)(2)(E)(applying Title VI to Hope for Homeownership of Single Family Dwellings program).

[51] 15 U.S.C. § 775 (May 7,1974), 23 U.S.C. § 324 (Aug. 13, 1973), 40 U.S.C. § 476 (Oct. 17, 1976), 42 U.S.C. §§ 300x-57(a)(3) (July 10, 1992), 3123 (Aug. 5, 1971), 5891 (Oct. 11, 1974), 6709 (July 22, 1976), 9821 (Aug. 13, 1981), 9849(b) (Aug. 13, 1981), 10406(a)(2) (Oct. 9, 1984). Several of these provisions also prohibit discrimination on the basis of religion.

[52] The statute provides that Part IA of the ADA will be enforced by means of "[t]he remedies, procedures, and rights set forth in section 794a of title 29." 42 U.S.C. § 12133. Section 794a is the enforcement

Congress can be assumed to have understood that this legislation would be enforced in the manner that had occurred in *Lau*, *Bazemore*, *Arline*, and *Alexander*. Any significant after-the-fact restriction on the use of private litigation to enforce Title VI regulations would limit the enforcement of these subsequently enacted laws and their implementing regulations in a manner Congress clearly could not have envisioned. It would be anomalous if Title VI itself were now interpreted more narrowly than the later enforcement provisions avowedly based on Title VI itself.

In light of the pervasive congressional activity in this area, Congress' decision not to act in the face of a quarter century of judicial enforcement of anti-discrimination regulations can fairly be deemed to reflect acquiescence in that practice. *See FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1313 (2000); *Evans v. United States*, 509 U.S. 255, 268-69 (1992).

V. THE CONSTITUTION DOES NOT REQUIRE THAT SPENDING CLAUSE LEGISLATION PROVIDE RECIPIENTS WITH A CLEAR STATEMENT OF HOW AND BY WHOM THEIR LEGAL OBLIGATIONS WILL BE ENFORCED

Petitioners urge this Court to adopt a new constitutional limitation on Spending Clause legislation. They propose that recipients of federal funds, even if they knowingly violate the conditions appurtenant to that grant, be immune from suit unless the federal statute contains an unequivocal statement both warning recipients that they could be sued for such violations and identifying the class of parties who could bring such lawsuits. The prior decisions of this Court provide no

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provision of section 504, which in turn expressly incorporates by reference the remedies, procedures and rights of Title VI.

The lower courts have recognized a private cause of action to enforce the regulations issued under Part IA. *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1334 (S.D.Cal. 1997), *aff'd*, 172 F.3d 876 (9th Cir. 1999); *Miller v. City of Johnson City, Tenn.*, No. 2:94-CV-246, 1996 WL 406679, at * 2 (E.D.Tenn. 1996); *McCready v. Michigan State Bar*, 881 F. Supp. 300, 306 (W.D.Mich. 1995).

support for such a novel constitutional requirement. Those decisions already recognize three other clear statement rules; the combined effect of these existing doctrines provides ample protection for recipients of federal funds and for the principles of federalism implicated by Spending Clause legislation.

First, this Court's decisions in *Pennhurst State School v. Halderman*, 451 U.S. 1, 17-18 (1981), and its progeny adopt a principle of statutory construction that interprets Spending Clause legislation to impose on fund recipients only those substantive legal obligations of which they could have been aware when they made the choice to accept the federal funds at issue. Federal law, of course, need not "prospectively resolve every possible ambiguity concerning particular applications of the . . . requirements." *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). This notice requirement is easily satisfied in the instant case. Title VI expressly alerts recipients that they must adhere to requirements set out in any "rules, regulations, or orders of general applicability" issued by the granting agency. 42 U.S.C. § 2000d-1. The Departments of Justice and Transportation promulgated the disparate impact regulations at issue in this case many years ago. *See* 28 C.F.R. § 42.104(b)(2)(first promulgated in 1966); 49 C.F.R. § 21.5(b)(2)(first promulgated in 1970). The applicability of those regulations to practices that disproportionately burden non-English speakers has long been set out in another Justice Department regulation, 28 C.F.R. 42.405(d)(1), and was emphasized by this Court's decision in *Lau v. Nichols*, 414 U.S. at 568. The assurances which Alabama officials signed as a condition of receiving federal funds included promises to abide by the terms of the federal regulations. App. 129a, 142a; *see* Pet. Br. at 11. In this instance, the Attorney General of Alabama expressly called to the attention of state officials the relevant provisions of federal law and the decision in *Lau*.

Second, the decisions of this Court recognize that in certain circumstances, it may not be practicable for recipients, although conversant with federal statutes and regulations, to know whether violations of those requirements are

occurring.[53] In such situations, private litigants may be entitled to injunctive relief, but not to damages for past violations that responsible officials could not with reasonable care have prevented. *Davis v. Monroe County Bd. of Educ.*, 119 S.Ct. 1661, 1669-75 (1999); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 287-92 (1998); *Guardians Ass'n v. Civil Serv. Commission, N.Y.C.*, 463 U.S. at 597-607 (White, J.). This limitation on the remedies that may be available under Title VI has no application to the instant case, because the plaintiffs seek only injunctive relief.

Third, this Court's Eleventh Amendment decisions mandate that federal legislation not be construed to subject a *state* to suit in federal court unless congressional intent to authorize such actions is clear on the face of the statute in question. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). With regard to Title VI, however, Congress has in fact adopted just such legislation. 42 U.S.C. § 2000d-7. In the instant case, moreover, respondents need not invoke that legislation, because the complaint sought and the courts below awarded injunctive relief against petitioner Alexander, in his capacity as Director of the Alabama Department of Pubic Safety. *See Ex parte Young*, 209 U.S. 123 (1908).

Petitioners insist, however, that there should be yet a fourth clear statement rule. Recipients of federal funds, they urge, are entitled to know in advance not only what obligations come with those funds, but also both how and by whom these conditions will be enforced. Because the cause of action in the instant case is implied, rather than expressly authorized in the terms of Title VI, petitioners object that they did not receive the requisite notice and cannot be subject to suit. (Pet. Br. at 27-29).

This contention demonstrably proves too much. The issue in this case is whether the long established implied cause of action "under Title VI" should be limited to enforcing the obligations established by section 601 or should also

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[53] These decisions are based on interpretations of the particular statutes at issue, rather than on any constitutionally mandated rule of construction.

encompass enforcing the obligations created by the Title VI regulations. Petitioners' contention does not support treating differently an implied cause of action to enforce section 601 duties and an implied cause of action to enforce Title VI regulation-based obligations; if their contention were accepted, *any* implied cause of action would be impermissible.[54]

Petitioners do not explain why a recipient of federal funds should be accorded immunity from suit to enforce well-known funding conditions solely because there was no clear advance notice of *which* parties might bring such actions. Petitioners appear to imply that principles of federalism entitle states to assume that they will be able to violate applicable federal laws with impunity unless they are expressly warned how, and by whom, enforcement may occur. Neither the decisions of this Court nor the "etiquette of federalism" require solicitude for recipients who violate federal law in the hope they will not be sued or who express even genuine surprise that the victims of those violations can seek to obtain redress in federal court. In the area of criminal law, the Constitution requires clear notice of what conduct is prohibited and of the level of sanction that may be imposed for a violation, but it has never been thought to entitle lawbreakers to prior notice of the identity of the police officers who may apprehend them.

Pennhurst provides no support for petitioners' proposed new clear statement rule. Petitioners attribute to *Pennhurst* a holding that in Spending Clause legislation, "Congress must 'unambiguously' create the cause of action, *Pennhurst State School v. Halderman*, 451 U.S. 1, 17." Pet. Br. at 20.; *see id.* at 16, 35, 36. The question resolved in *Pennhurst*, however, was *not* whether the statute in that case could be enforced by means of an implied cause of action; to the contrary, this Court expressly did not reach that question.[55]

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[54] Petitioners indeed appear to insist that *any* implied cause of action would be impermissible. Pet. Br. at 19.

[55] 451 U.S. at 10 ("Petitioners first contend that 42 U.S.C. § 6010 does not create in favor of the mentally retarded any substantive rights to 'appropriate treatment' in the 'least restrictive' environment. . . . Rather, the issue was whether the provision of the statute on which the plaintiffs there relied actually forbade the conduct about which they had complained. The word "unambiguously" was used in the *Pennhurst* opinion in a statement about a state's substantive duties, not about the existence of a cause of action. It was with regard to the asserted duty to provide certain medical treatment that *Pennhurst* insisted that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." 451 U.S. at 17.

This Court concluded in *Pennhurst* that the provision in question was merely precatory and imposed on the state no substantive obligations at all. Petitioners do not deny that Title VI and the section 602 regulations create specific legal obligations or that, as a condition of receiving federal funds, they assured the United States that they would meet those conditions. Petitioners simply seek to avoid private judicial enforcement of these obligations and assurances. "The contrast between the congressional preference at issue in *Pennhurst* and the antidiscrimination mandate of [Title VI] could not be more stark." *School Bd. v. Arline*, 480 U.S. 289, 287 n.15 (1987).

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Petitioners next assert that any rights created by the Act are enforceable in federal court only by the Federal Government, not by private parties. . . . Because we agree with petitioners' first contention—that § 6010 simply does not create substantive rights—we find it unnecessary to address the remaining issues.").

Respectfully submitted,

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APPENDICES

APPENDIX A

Lower Court Cases Brought Pursuant to Regulations Issued under Title VI, Title IX, and § 504 of the Rehabilitation Act prior to Enactment of the Civil Rights Restoration Act[1]

A. Circuit Court Decisions

David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988) (alleging violation of Title VI and 28 C.F.R. 42.104; "plaintiffs need not show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations")

Disabled in Action v. Sykes, 833 F.2d 1113, 1114 (3d Cir. 1987) (holding that defendant's compliance with one section of § 504 regulations "did not excuse compliance with the accessibility requirements" of another section of regulations)

Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1045 (7th Cir. 1987) (upholding plaintiffs' Title VI claim based on the implementing regulations "even though there was no allegation in the complaint that the defendants acted with a discriminatory intent")

Paisey v. Vitale, 807 F.2d 889, 892 (11th Cir. 1986) (citation omitted) (alleging that defendant's actions "are proscribed activity when 'read in pari materia with 34 C.F.R. 100.7(e) implementing Title VI of the Civil Rights Act of 1964'")

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[1] The Civil Rights Restoration Act was enacted on March 22, 1988.

Latinos Unidos de Chelsea en Accion (LUCHA) v. Secretary of HUD, 799 F.2d 774, 783 (1st Cir. 1986) (alleging violations of Title VI regulation, 24 C.F.R. § 1.4)

Craft v. Board of Trustees, 793 F.2d 140, 142 (7th Cir. 1986) (recognizing that Title VI regulations allow for "limited prospective relief . . . under a theory of disparate impact")

Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985)(internal footnote omitted) ("There is no doubt that the plaintiffs predicated this cause of action on the [Title VI] regulations. As a result, the district court correctly applied disparate impact analyses to their Title VI claims.")

Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984) ("[I]n light of appellee's reliance on the regulations [issued pursuant to Title VI], we find it appropriate to apply a discriminatory effect analysis.")

Haffer v. Temple Univ., 688 F.2d 14, 15 n.1 (3d Cir. 1982) (alleging that defendant did not comply with Department of Education regulations issued under Title IX)

Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376, 1376, 1377 (11th Cir. 1982) (alleging that defendant violated 49 C.F.R § 27.31, issued pursuant to § 504 of the Rehabilitation Act)

New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847, 852 (10th Cir. 1982) ("Relevant to this action are those [§ 504] regulations directed at handicapped services offered by . . . public schools . . . . It is against this regulatory backdrop that the State's special education system was examined and found wanting at trial.")

Doe v. New York Univ., 666 F.2d 761, 770 (2d Cir. 1981) (alleging that defendant violated § 504 regulations)

Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 656 (6th Cir. 1981) (alleging the defendant's rules violated Title IX regulation, 45 C.F.R. § 86.41)

Alexander v. Yale Univ., 631 F.2d 178, 185 (2d Cir. 1980) (alleging that defendant failed to comply with Title IX regulation, 45 C.F.R. § 86.8(b))

Baker v. Bell, 630 F.2d 1046, 1048-49 & n.4 (5th Cir. 1980) (alleging violation of § 504 of Rehabilitation Act and its implementing regulations)

Serna v. Portales Mun. Sch., 499 F.2d 1147, 1153-54 (10th Cir. 1974) (holding that the defendant school violated Title VI and Title VI regulations because its curriculum had "the effect of discrimination even though probably no purposeful design")

Allen v. Mississippi Comm'n of Law Enforcement, 424 F.2d 285, 288 (5th Cir. 1970) (alleging that defendants violated Title VI and Title VI regulations)

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Eastern Paralyzed Veterans Ass'n v. Sykes, 697 F. Supp. 854, 857 (E.D. Pa. 1988) (alleging that defendant violated 49 C.F.R. §§ 27.61-27.67, issued pursuant to § 504)

Andre H. v. Ambach, 104 F.R.D. 606, 608 (S.D.N.Y. 1985) (alleging violation of 34 C.F.R. § 104, issued pursuant to § 504 of Rehabilitation Act)

Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 126 (S.D. Ohio 1984) (stating that 23

C.F.R. § 710.405, issued pursuant to Title VI, "contemplates that discriminatory effect can be a violation, even where there is no discriminatory purpose")

Mabry v. State Bd. for Community Colleges & Occupational Educ., 597 F. Supp. 1235, 1238 (D. Colo. 1984) (alleging violation of Title IX and its regulations), *aff'd*, 813 F.2d 311 (10th Cir. 1987)

Subway Newsdealers Corp. v. Metropolitan Transp. Auth., 563 F. Supp. 319, 320 (S.D.N.Y. 1983) (alleging that defendant violated DOT regulations implementing Title VI)

Yaris v. Special Sch. Dist., 558 F. Supp. 545, 561 (E.D. Mo. 1983) (alleging violation of 34 C.F.R. § 104.33, implementing § 504)

Thomas v. Johnston, 557 F. Supp. 879, 890 (W.D. Tex. 1983) (alleging violation of § 504 of Rehabilitation Act and its implementing regulations)

O'Connor v. Board of Educ., 545 F. Supp. 376, 382 (N.D. Ill. 1982) (alleging that the defendants violated Title IX regulation, 45 C.F.R. § 86.41)

Gary B. v. Cronin, 542 F. Supp. 102, 106, 111 (N.D. Ill. 1982) (finding that plaintiffs' claims that defendants violated Rehabilitation Act and its regulations survived motion to dismiss)

Lane v. Lincoln County Hosp., 537 F. Supp. 114, 119-20 (E.D. Tenn. 1982) (alleging violation of 42 C.F.R. § 124.603, implementing § 504 of the Rehabilitation Act)

Dopico v. Goldschmidt, 518 F. Supp. 1161, 1168-69 (S.D.N.Y. 1981) (alleging violations of § 504 of Rehabilitation Act and its regulations), *aff'd in part, rev'd in part*, 687 F.2d 644 (2d Cir. 1982)

Jennings v. Alexander, 518 F. Supp. 877, 879, 885 (M.D. Tenn. 1981) (where plaintiffs allege violations of § 504 of Rehabilitation Act and its regulations, "agreeing that a disparate impact test is the appropriate standard to apply in a § 504 case"), *rev'd on other grounds*, *Alexander v. Choate*, 469 U.S. 287, 299 (1985) ("[W]e assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.")

Philipp v . Carey, 517 F. Supp. 513, 515 (N.D.N.Y. 1981) (alleging that defendants violated Rehabilitation Act implementing regulations)

Doe v. Syracuse Sch. Dist., 508 F. Supp. 333, 337 (N.D.N.Y. 1981) (finding that defendant "violate[d] both the letter and spirit" of 45 C.F.R. § 84.14, implementing § 504 of the Rehabilitation Act)

Jackson v. Conway, 476 F. Supp. 896, 903-04 (E.D. Mo. 1979) (finding that plaintiffs have failed to demonstrate probable success on the merits where they failed to show that defendants had not satisfied applicable Title VI regulation)

Rone v. Fireman, 473 F. Supp. 92, 129 (N.D. Ohio 1979) (alleging that defendant violated various § 504 implementing regulations)

Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 663, 665 (D.R.I.) (where plaintiff alleged violation of Title IX and its regulations, stating that the "dispute is resolved by interpreting and applying the regulation promulgated under Title IX" and granting plaintiff's motion for preliminary injunction), *vacated as moot*, 604 F.2d 733, 734 (1st Cir. 1979)

Rios v. Read, 73 F.R.D. 589, 595 (E.D.N.Y. 1977) (defining the defendant school district's obligations based on requirements in Title VI's regulations)

Metropolitan Detroit Plumbing & Mechanical Contractors Ass'n v. Department of Health, Educ. & Welfare, 418 F. Supp. 585, 589 (E.D. Mich. 1976) (looking to Title VI regulation, 45 C.F.R. § 80.3, to determine whether plaintiffs had shown substantial likelihood of success on merits)

Flanagan v. President & Dir. of Georgetown College, 417 F. Supp. 377, 381 (D.D.C. 1976) (alleging that defendants' allotment of financial aid on basis of race was "in violation of specific prohibitions in the H.E.W. regulations, as well as the general prohibition in the statute")

Mendoza v. Lavine, 412 F. Supp. 1105, 1106, 1107 (S.D.N.Y. 1076) (alleging violation of Title VI and its regulations)

Blackshear Residents Org. v. Housing Auth., 347 F. Supp. 1138, 1146-47 (W.D. Tex. 1972) (determining that Housing Authority's actions "are subject to judicial review" to determine compliance with Title VI discriminatory effects regulations)

North Phila. Community Bd. v. Temple Univ., 330 F. Supp. 1107, 1111 (E.D. Pa. 1971) (finding that the "actions complained of by plaintiffs are specifically prohibited by [Title VI regulations] Part 80 of Title 45, C.F.R.")

APPENDIX B

Lower Court Cases Brought Pursuant to Regulations Issued under Title VI after the Enactment of the Civil Rights Restoration Act[1]

A. Circuit Court Decisions

New York City Envtl. Justice Alliance v. Giulani, 214 F.3d 65, 67 (2d Cir. 2000) (alleging that defendant's proposed sale of community gardens would have a discriminatory effect on minorities in violation of Title VI regulation, 45 C.F.R. § 7.35)

Cureton v. National Collegiate Athletic Ass'n, 198 F.3d 107, 111 (3d Cir. 1999) (alleging that defendants violated Title VI discriminatory effects regulations)

Powell v. Ridge, 189 F.3d 387, 399 (3d Cir.) (holding implied private of action available to enforce Title VI regulations), *cert. denied*, 120 S. Ct. 579 (1999)

Indianapolis Minority Contractors Ass'n v. Wiley, 187 F.3d 743, 750 (7th Cir. 1999) (alleging violation of Title VI regulations)

Ferguson v. City of Charleston, 186 F.3d 469, 473 (4th Cir. 1999) (alleging that defendant violated discriminatory effects regulations promulgated under Title VI), *cert. granted*, 120 S. Ct. 1239 (2000)

Burton v. City of Belle Glade, 178 F.3d 1175, 1202 (11th Cir. 1999) (recognizing "an implied private right of action to enforce the regulations promulgated under Section 602 of Title VI")

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[1] The Civil Rights Restoration Act was enacted on March 22, 1988.

Goshen Road Envtl. Action Team v. United States Dep't of Agric., No. 98-2102, 1999 WL 187264, at **2 (4th Cir. Apr. 6, 1999) (alleging that defendants violated USDA discriminatory effects regulations promulgated under Title VI)

Caractor v. Town of Hempstead Dep't of Urban Renewal, No. 97-9150, 1998 WL 536385, at **2 (2d Cir. June 11, 1998) (claims "arguably" based on Title VI regulations governing Section 8 housing)

Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 927 (3d Cir. 1997) (alleging that defendant violated EPA discriminatory effects regulations promulgated under Title VI; holding "that a private right of action exists under section 602 of Title VI and its implementing regulations"), *judgment vacated as moot*, 119 S. Ct. 22 (1998)

Villanueva v. Carere, 85 F.3d 481, 484 (10th Cir. 1996) (alleging that defendant violated Title VI regulations)

City of Chicago v. Lindley, 66 F.3d 819, 827-828 (7th Cir. 1995) (alleging that defendant violated HHS's Title VI discriminatory effects regulations)

Linton v. Commissioner of Health & Env't, 65 F.3d 508, 512 (6th Cir. 1995) (alleging that defendants violated Title VI discriminatory effects regulations)

New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (alleging that defendant violated Department of Transportation's Title VI regulations)

Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1400 (11th Cir. 1993) (alleging that defendant violated Department of Education's Title VI discriminatory effects regulations)

B. District Court Decisions

Ceaser v. Pataki, No. 98CIV.8532(LMM), 2000 WL 1154318, at *1, *3 (S.D.N.Y. Aug. 14, 2000) (alleging that defendants violated Title VI regulations; "a private right of action under the HEW regulations does exist")

Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 1139 (N.D. Cal. 2000) (stating that "[u]nder Title VI . . . . Plaintiffs may state a claim…for equitable relief pursuant to the regulations")

GI Forum v. Texas Educ. Agency, 87 F. Supp. 2d 667, 677 (W.D. Tex. 2000) (citations omitted) ("Plaintiffs have brought . . . suit . . . pursuant to 34 C.F.R. §100.3, a regulation promulgated by the Department of Education to implement Title VI . . . . The language of the regulation clearly suggests that a disparate impact analysis is appropriate under this regulation, and courts have applied it in that manner.")

Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police, 72 F. Supp. 2d 560, 567 (D. Md. 1999) (agreeing with the district court in *Sandoval v. Hagan* that a private right of action is available to enforce a discriminatory effects regulation)

Flores v. Arizona, 48 F. Supp. 2d 937, 942 (D. Ariz. 1999) (finding that there is a private right of action under Title VI regulation, 34 C.F.R. § 100)

Harper v. Board of Regents, Illinois State Univ., 35 F. Supp. 2d 1118, 1123 (C.D. Ill. 1999) (citations omitted) (alleging that defendants violated 35 C.F.R. § 100.3(b)(2) and 45 C.F.R. § 80.3(b)(2); "'actions having an unjustifiable disparate impact on minorities [may] be redressed through agency regulations'")

Aghazadeh v. Maine Med. Ctr., No. 98-421-P-C, 1999 WL 33117182, at *1, *5-*7 (D. Me. June 8, 1999) (refusing to dismiss plaintiff's claim that defendant violated Title VI regulation, 45 C.F.R. § 80)

Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1022 (N.D. Cal. 1998) (alleging that defendants violated Title VI regulation, 34 C.F.R. § 100.3(b)(2))

African Am. Legal Defense Fund v. New York State Dep't of Educ., 8 F. Supp. 2d 330, 337 (S.D.N.Y. 1998) (alleging that defendants violated 34 C.F.R. § 100.3(b)(2); "[u]nder Guardians Ass'n . . . agency regulations promulgated under Title VI may provide for a basis of recovery under a disparate impact theory")

Bryant v. New Jersey Dep't of Transp., 1 F. Supp. 2d 426, 429 (D.N.J. 1998) (alleging that defendant violated Department of Transportation Title VI discriminatory effects regulation)

Neal v. Board of Trustees, No. CV-F-97-5009RECSMS, 1997 WL 1524813, at *15 (E.D. Cal. Dec. 26, 1997) (granting leave to amend complaint to allege violations of Title VI discriminatory effects regulations)

Young v. Montgomery County Bd. of Educ., 922 F. Supp. 544, 549 (M.D. Ala. 1996) (alleging that defendant violated 34 C.F.R. § 100.3(b)(2); "[e]ven though Title VI itself bars only intentional discrimination, the regulations promulgated pursuant to Title VI proscribe some actions that merely have a disparate impact on groups protected by the statute")

Meyers v. Board of Educ., 905 F. Supp. 1544, 1573 (D. Utah 1995) (alleging that defendant violated Title VI regulations, 34 C.F.R. §§ 100.1 – 100.13)

Hodges v. Public Bldg. Comm'n, 864 F. Supp. 1493, 1504 (N.D. Ill. 1994) (alleging that defendant violated Title VI regulations)

City of Chicago v. Lindley, No. 92 C 4666, 1994 WL 517700, at *13 (N.D. Ill. Sept. 9, 1994) ("While [42 U.S.C. 2000d] provides only for claims based on discriminatory intent, disparate impact claims may be brought under the statute's implementing regulations at 45 C.F.R. § 80.3.")

Grimes v. Sobol, 832 F. Supp. 704, 709 (S.D.N.Y. 1993) (granting plaintiff leave to plead a claim that defendant violated Title VI regulation, 34 C.F.R. § 103(b)(2)), *aff'd*, 37 F.3d 857 (2d Cir. 1994)

Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1523 (M.D. Ala. 1991) (citation omitted) ("[W]here a lawsuit is predicated on the federal regulations promulgated under Title VI redress is available for facially neutral 'actions having an unjustifiable disparate impact on minorities.'")

Dartmouth Review v. Dartmouth College, 709 F. Supp. 32, 39 n.10 (D.N.H.) ("A cause of action under Title VI may also be proven by showing disparate impact if the basis of the claim is a breach of the regulations promulgated thereunder."), *aff'd*, 889 F.2d 13 (1st Cir. 1989)

Meek v. Martinez, 724 F. Supp. 888, 900, 905 (S.D. Fla. 1989) (seeking relief for violations of Title VI regulation, 45 C.F.R. § 80)

DEC 13 2000

FILED

DEC 13 2000

OFFICE OF THE CLERK

No. 99-1908

In the Supreme Court of the United States

JAMES ALEXANDER, ETC., ET AL., PETITIONERS

v.

MARTHA SANDOVAL, ETC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an implied private right of action exists under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, for injunctive relief against a recipient of federal financial assistance that, in violation of federal agency regulations implementing Title VI, uses criteria or methods of administration in the implementation of a program or activity that have the effect of subjecting persons to discrimination because of their race, color, or national origin.

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In the Supreme Court of the United States

No. 99-1908

JAMES ALEXANDER, ETC., ET AL., PETITIONERS

v.

MARTHA SANDOVAL, ETC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

This case involves a contention, sustained by the lower courts, that petitioners administered driver's license examinations in a manner that had the unjustified, and hence unlawful, effect of discriminating against individuals based on their national origin. Petitioners have not challenged in this Court the lower courts' conclusions that their driver's license examinations did have that discriminatory effect and that the effect was not justified by a legitimate governmental objective. Nor did petitioners contest in the court of appeals that their operation of a program with an unjustified discriminatory effect on individuals based on their national origin would contravene federal law. Rather, petitioners

argued below that respondents had no private right of action to sue to compel petitioners to change their policy. Both lower courts rejected that contention, which is the only issue properly before this Court.

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, was enacted as part of Congress's comprehensive effort to combat discrimination on the basis of race, color, and national origin. Title VI was enacted to ensure that federal agencies, through the provision of federal financial assistance, did not support entities that engaged in programs or activities that had the purpose or effect of such discrimination. See 110 Cong. Rec. 6543 (1964) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.") (statement of Sen. Humphrey, quoting President Kennedy's message to Congress). From the outset, Congress anticipated that federal agencies would play a leading role in defining the prohibition against discrimination to which grant recipients would be required to adhere in order to obtain federal assistance. Thus, while Congress itself provided, in Section 601 of Title VI, 42 U.S.C. 2000d, that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance," Congress also provided, in Section 602 of Title VI, that federal agencies are empowered to impose substantive conditions on grant recipients in order to effectuate the national policy against discrimination. Section 602 states in pertinent part:

> Each Federal department and agency which is empowered to extend federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. 2000d-1. Congress further required, in an unusual provision, that any such agency "rule[], regulation[] or order[] of general applicability" be reviewed by the President before becoming effective. *Ibid.* And Section 603 of Title VI, 42 U.S.C. 2000d-2, authorized judicial review of agency action taken "upon a finding of failure to comply with any requirement imposed pursuant to" Section 602, thus indicating that recipients' obligations would be governed by the requirements imposed by the agencies under the authority delegated in Section 602 as well as Section 601's broad statutory duty.

Shortly after Title VI was enacted, a Presidential task force and the Department of Justice drafted model Title VI regulations which specified that recipients of federal funds may not use "criteria or methods of administration which have the *effect* of subjecting individuals to discrimination" on the basis of race, color, or national origin. See 45 C.F.R. 80.3(b)(2) (1964) (emphasis added); 29 Fed. Reg. 16,274-16,305 (1964). The regulations at issue in this case, issued by the Departments of Justice and Transportation, followed the model regulations. See 31 Fed. Reg. 10,265 (1966) (Justice); 35 Fed. Reg. 10,080 (1970) (Transportation). Following the promulgation of the initial regulations, "every Cabinet Department and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs

with a discriminatory impact." *Alexander* v. *Choate*, 469 U.S. 287, 294 n.11 (1985).[1]

2. Petitioners receive millions of dollars in federal financial assistance every year from the Department of Transportation and the Department of Justice. Pet. App. 76a-77a. In accordance with the conditions imposed by those agencies' Title VI regulations, petitioners have submitted assurances to the agencies that they will comply with Title VI and federal agency regulations promulgated thereunder. See *id.* at 115a.[2]

Before 1991, petitioners administered written driver's license examinations in as many as 14 foreign languages. Pet. App. 167a-168a. In 1991, after an amendment to the

[1] We are informed that, at present, 26 federal agencies have regulations under Title VI that follow the model regulations in prohibiting recipients of federal financial assistance from operating their programs and activities in a manner that has the effect of subjecting individuals to discrimination on the basis of race, color, or national origin.

[2] Petitioners state (Pet. Br. 10-11) that the assurance they provided to the Department of Transportation in connection with that agency's grant did not require them to comply with federal agency regulations promulgated under Title VI, although it did require them to comply with the anti-discrimination rule of the statute itself. It appears, however, that the copy of the assurance that petitioners filed in district court contained only the front of the assurance form, but not the back side, which includes the promise to comply with Title VI regulations as well as the signature line. We are informed by the Department of Transportation that the one-sided unsigned form filed by petitioners in district court is an accurate copy of the original assurance that the state agency provided to that Department on August 19, 1992, but that the Department subsequently recognized the error and requested a signed assurance form from the state agency, including a promise to comply with federal regulations. On December 9, 1992, the state agency submitted to the Department of Transportation a signed two-page assurance form that includes a promise to "comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program." We have lodged a copy of that signed assurance form with the Clerk.

Alabama state constitution declared English the official language of Alabama, petitioners adopted an "English-only" policy, which requires all portions of the driver's license examination process to be administered in English only, and which forbids the use of interpreters, translation dictionaries, or other interpretive aids, even if privately provided. *Id.* at 166a-167a, 169a-171a. Petitioners defended the English-only policy on the ground that proficiency in written and spoken English is necessary to the safe operation of a motor vehicle, to ensure that drivers can read traffic signs in English and follow directions in English from law enforcement officers. *Id.* at 208a-213a. Petitioners have continued, however, to provide driver's licenses to illiterate and deaf persons as well as non-resident non-English speakers, *id.* at 213a-216a, and also provide a "multitude of special accommodations" (*id.* at 217a) for such persons when they take the driver's license examination. The evidence at trial also demonstrated that even persons with limited English skills "could still understand road signs utilized in Alabama and around the world," *id.* at 215a, and that law enforcement officers in Alabama are able to make themselves understood to persons (such as deaf persons) who cannot speak or understand oral English by using other forms of communication, such as hand signals, *id.* at 215a-216a.

3. Respondents (an individual affected by the English-only policy and a class of persons similarly situated) brought suit in district court, alleging, *inter alia*, that petitioners' English-only policy violated agency regulations implementing Title VI in that the policy has the effect of subjecting non-English speakers to discrimination based on their national origin. Respondents pursued their claim against the state agency (the recipient of the federal funds)

directly under Title VI and its implementing regulations. J.A. 10.[3]

The district court agreed with respondents that petitioners' policy violated the federal agencies' Title VI regulations, insofar as those regulations prohibit recipients of federal assistance from operating programs and activities in manner that subjects individuals to discrimination based on national origin. Pet. App. 149a-252a. In particular, the district court concluded that, on the facts of this case, an English-only rule had the effect of discrimination based on national origin, since a "strong nexus between language and national origin" was shown, see *id.* at 158a, and since the

[3] Respondents also brought suit against the Director of the Alabama Department of Public Safety in his official capacity under 42 U.S.C. 1983, alleging that the English-only policy violated the Fourteenth Amendment. J.A. 10. The district court subsequently permitted respondents to amend the complaint to name the Director as a defendant to the Title VI action directly, Pet. App. 68a-72a, but the complaint does not appear to proceed against the Director under 42 U.S.C. 1983 based on the violation of the federal regulations. Cf. *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). At the time this lawsuit was filed, it was unclear whether the Eleventh Circuit would have permitted a suit under Section 1983 based on a violation of a federal regulation implementing a statute enacted under Congress's Spending Clause authority. See *Harris* v. *James*, 127 F.3d 993, 1008-1011 (11th Cir. 1997). Subsequently, that court ruled that a Section 1983 suit does lie to enforce regulations that "define the contours of [a] statutory right" even when the federal statute was enacted under the Spending Clause. See *Doe* v. *Chiles*, 136 F.3d 709, 717 (11th Cir. 1998). Thus, whether or not private individuals such as respondents may pursue a private right of action directly under Title VI to enforce agency regulations, it is possible that such individuals may be able to proceed under Section 1983 to enforce federal rights secured under such regulations. See *Powell* v. *Ridge*, 189 F.3d 387, 400-403 (3d Cir.), cert. denied, 120 S. Ct. 579 (1999). But because Title VI and agency regulations promulgated thereunder also apply to nongovernmental recipients of federal financial assistance, who are not subject to suit under Section 1983, the issue in this case has independent and continuing significance.

"vast majority" of non-English speakers in Alabama affected by the English-only policy are "from a country of origin other than the United States," *id.* at 163a. Relying on disparate-impact principles drawn from cases under Title VII of the Civil Rights Act of 1964 (see *id.* at 149a-152a), the district court further agreed with respondents that petitioners' English-only policy had a disproportionate adverse effect on individuals based on their national origin, see *id.* at 164a-204a, and that the policy was not supported by a substantial legitimate justification, see *id.* at 205a-246a. The court accordingly entered an injunction against future implementation of the policy and directed petitioners to fashion means for the accommodation of non-English speakers who seek driver's licenses. *Id.* at 253a.

4. On appeal, petitioners contended that respondents could not pursue a private right of action based on the agencies' Title VI regulations (Pet. C.A. Br. 24-33), that such an action was barred by Eleventh Amendment immunity, which had not been validly abrogated by Congress (*id.* at 34-39), and that the district court's ruling on the merits was erroneous (*id.* at 48-54). Petitioners did not argue, however, that the agencies' Title VI regulations were invalid insofar as they prohibited recipients from implementing programs or activities in a manner with a discriminatory *effect*.[4]

[4] To the contrary, petitioners acknowledged in the court of appeals that "the Supreme Court [had] upheld the promulgation" of the agencies' discriminatory-effect regulations. Pet. C.A. Br. 27. As petitioners explained to the court of appeals (*id.* at 28):

> In [*Guardians Association* v. *Civil Service Commission of the City of New York*, 463 U.S. 582 (1983)], the Court affirmed the denial of compensatory relief to plaintiffs in a Title VI discrimination lawsuit. In so doing, the Court reached two conclusions. First, seven members of the Court agreed that proof of discriminatory intent was required to establish a violation of Title VI. [*Guardians*,] 463 U.S. 607 n.1 (opinion of Powell, J.). Second, five members joined "to form a

Because it appeared that petitioners had drawn in question the constitutionality of Congress's abrogation of the State's Eleventh Amendment immunity (at 42 U.S.C. 2000d-7) to private actions under Title VI, insofar as those actions seek to enforce agency regulations promulgated under Section 602, the United States intervened as a party in the court of appeals, pursuant to 28 U.S.C. 2403(a).[5]

The court of appeals affirmed. Pet. App. 1a-57a. The court noted that petitioners had "concede[d] that these agency implementing regulations [prohibiting discriminatory effects] are valid exercises of agency authority," *id.* at 5a n.2, and had also "concede[d] that the [Alabama] Department of Public Safety is subject to such regulations through monies it receives both from the Department of Transportation and the Department of Justice," *id.* at 36a. The court further noted that petitioners did "not challenge the district court's factual findings, its use of Title VII disparate impact principles to analyze [respondents'] Title VI claims, or its formulation of the disparate impact analyses," *id.* at 12a.

The court also rejected petitioners' Eleventh Amendment defense, concluding that the State had waived its immunity to suit by accepting federal funds in the face of clear notice that Congress intended States accepting federal assistance to be subject to suit under Title VI. Pet. App. 15a-19a. The court rejected (*id.* at 16a n.5) petitioners' contention that

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majority for upholding the *validity* of the regulations incorporating a disparate-impact standard." *Id.*, 463 U.S. at 607 n. 27 (opinion of White, J.) (emphasis added); *see also, id.* at 584 n.2. While the Court upheld the validity of the regulations, it did not hold that a private right of action to enforce those regulations was available.

(Emphasis and words "emphasis added" in petitioners' appellate brief.) Petitioners also did not challenge the validity of the agencies' Title VI regulations in their petition for rehearing.

[5] The United States is therefore a respondent in this case under this Court's Rule 12.6.

Congress's clear statement that States accepting federal funds shall be subject to suit under Title VI, notwithstanding the Eleventh Amendment, did not apply to suits under the "accompanying administrative regulations promulgated under Section 602," observing that "[t]here is no evidence that Congress somehow differentiated between suits to enforce the statute and suits to enforce the regulations promulgated thereunder." The court further observed that the State remains free to decline federal funds if it objects to the conditions imposed by the agency regulations under Section 602, and so it found "no constitutional defect inherent" in Section 2000d-7. *Id.* at 19a.[6]

Thus, the "central issue" before the court was "whether there is an implied private cause of action to enforce agency regulations." Pet. App. 37a. Relying on prior circuit precedent (*id.* at 37a-42a) as well as this Court's decisions in *Lau* v. *Nichols*, 414 U.S. 563 (1974), *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), and *Alexander* v. *Choate*, 469 U.S. 287 (1985), the court concluded that "(1) disparate impact regulations promulgated pursuant to Section 602 of Title VI constitute an authoritative construction of Title VI's antidiscrimination provisions; (2) private parties may enforce these regulations to obtain declaratory and injunctive relief; and (3) Title VI's legislative history and scheme unequivocally support an implied cause of action under Section 601 and Section 602." *Id.* at 48a. Accordingly, the court concluded that respondents had properly invoked a private right of action under

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[6] The court also made clear that a suit against the Director of the Department of Public Safety in his official capacity seeking injunctive relief from future operation of the English-only policy could proceed under *Ex parte Young*, 209 U.S. 123 (1908), without Eleventh Amendment objection. See Pet. App. 32a-34a.

Title VI, *ibid.* It therefore affirmed the injunctive relief ordered by the district court. *Id.* at 57a.

SUMMARY OF ARGUMENT

I. Private individuals may pursue an implied right of action against a recipient of federal funds to enforce agency regulations implementing Title VI of the Civil Rights Act of 1964 that prohibit recipients from administering programs and activities in a manner that has the effect of subjecting individuals to discrimination based on their race, color, or national origin. Congress enacted Title VI at a time when the courts, including this Court, routinely permitted individuals injured by the violation of a statute and its implementing regulations to enforce the statute and regulations even absent an express cause of action or any particular manifestation of congressional intent that the statute and regulations should be privately enforced. While such liberal implication of private rights of action is no longer the rule, Congress's intent at the time of the enactment of Title VI must be viewed in light of that legal context. Title VI and its implementing regulations are precisely the kind of measure that Congress, at the time of enactment of Title VI, would have expected to be enforced by implied right of action. Title VI is broadly worded legislation empowering federal agencies to ensure that the public funds they disburse not support entities that engage in conduct with a discriminatory purpose or effect. And in Section 602 of the Act, Congress required each federal agency, with the concurrence of the President, to promulgate legislative regulations to effectuate the protection of individuals from discrimination on the grounds of race and national origin enunciated in Section 601.

Congress ratified the existence of an implied right of action to enforce Title VI regulations in the Civil Rights Restoration Act of 1987. Before that statute was enacted,

this Court had adjudicated private claims to enforce Title VI regulations in at least three cases, and the lower courts had consistently implied a private right of action to enforce the regulations at issue. Congress was specifically aware of private enforcement of the discriminatory-effect regulations but nonetheless expanded the scope of Title VI without limiting the private right of action. That legislative action preserved and ratified the private right of action for enforcement of Title VI regulations.

Private enforcement of Title VI regulations is consistent with the text of Section 602, which sets forth procedural requirements before a federal agency may take action because of noncompliance with Title VI either to terminate federal funding or to bring suit against a recipient to require compliance with Title VI. Those requirements apply to federal agency enforcement of Title VI, not to private enforcement. They are based largely on Congress's particular concerns that federal agencies not freely terminate federal assistance, and that the vast litigation resources of the federal government not overwhelm those of recipients, concerns not applicable to private enforcement. Further, the United States does not perceive that private enforcement has interfered or will interfere with the orderly administrative enforcement of Title VI regulations. Rather, private enforcement is consistent with, and in many instances necessary to ensuring that individuals have effective protection against discriminatory practices by recipients of federal funds. The courts also can ensure that agencies are heard on questions involving the interpretation and application of their regulations.

Petitioners' contention that no private cause of action to enforce Title VI may be implied is inconsistent with *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). Nor do this Court's decisions establish any requirement that recipients of federal funds be put on clear notice not only of their legal

duties (an obligation met here by the statute and regulations) but also about the method by which a victim of their violations can enforce those duties. While the Court has tailored the availability of a compensatory damages remedy in implied rights of action to avoid burdening recipients with retrospective liability for unknowing violations, this Court's applicable precedents do not suggest that a private cause of action should be denied simply because Congress failed to expressly identify such private enforcement in the text of the statute.

II. Petitioners appear to maintain that federal agencies' discriminatory-effect Title VI regulations, on the books for more than 30 years, are invalid. That argument was neither preserved below nor presented in the certiorari petition and is therefore not properly before the Court. The contention is in any event meritless. The Court applied the regulations to grant relief in *Lau* v. *Nichols*, 414 U.S. 563 (1974), reexamined the regulations and found them valid in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), and reaffirmed their validity in *Alexander* v. *Choate*, 469 U.S. 287 (1985).

Those holdings are consistent with the broad textual authority granted to the agencies in Section 602 and with the legislative history of Title VI, which makes clear that Congress intended that agencies would have authority to define the content of the prohibition against discrimination and could make effective the right to be free from discrimination by prohibiting facially neutral polices and practices that had the potential to be a subterfuge for intentional discrimination or to perpetuate the lingering effects of past intentional discrimination. Congress subsequently ratified the regulations by enacting legislation to implement this Court's decision in *Lau*, by requiring agencies enforcing other statutes to promulgate regulations similar to those issued under Title VI, and by adopting other anti-discrimination

statutes modeled on Title VI in full awareness of Title VI's administrative implementation, which Congress has consistently monitored very closely. The background to Congress's enactment of the Civil Rights Restoration Act of 1987 also shows that Congress expanded the coverage of Title VI while well aware of the agencies' discriminatory-effect regulations. Thirty-five years after the initial promulgation of the discriminatory-effect regulations (which were reviewed by the President before becoming effective), after decisions by this Court over the course of two decades, and after constant oversight and legislation by Congress in this area, it is much too late to say the regulations were never valid.

ARGUMENT

For more than thirty years, almost all federal agencies have had in place regulations, promulgated to effectuate the anti-discrimination principle of Title VI, that prohibit recipients of federal financial assistance from administering programs in a manner that has the effect of subjecting individuals to discrimination based on race, color, and national origin. This Court has consistently recognized the validity of those regulations. For many years as well, private individuals have pursued private rights of action against recipients of federal assistance to require recipients of federal financial assistance to adhere to those regulations, without any discernable detrimental effect on the separate enforcement responsibility of the federal agencies. Both the discriminatory-effect regulations and the existence of a private right of action to enforce them are consistent as well with Congress's intent in Title VI and with subsequent legislation enacted by Congress. The court of appeals therefore properly affirmed the district court's entry of injunctive relief.

I. INDIVIDUALS HAVE A PRIVATE RIGHT OF ACTION FOR INJUNCTIVE RELIEF AGAINST RECIPIENTS OF FEDERAL ASSISTANCE THAT VIOLATE FEDERAL AGENCIES' TITLE VI DISCRIMINATORY-EFFECT REGULATIONS

A. The Congress That Enacted Title VI Intended That Agencies' Substantive Title VI Regulations, Like The Statutory Prohibition Against Discrimination, Would Be Enforced By Private Right Of Action

1. Whether an implied private right of action exists to enforce the Title VI discriminatory-effect regulations is fundamentally a question of statutory construction. The Court's approach to the question of legislative intent to allow private rights of action, however, has changed since the time that Title VI was enacted. See *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 698-699 (1979); *id.* at 717-718 (Rehnquist, J., concurring). Whereas the Court today examines more recently enacted statutes under the somewhat restrictive test set forth in *Cort* v. *Ash*, 422 U.S. 66 (1975), "Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to decide whether there should be a private right of action." *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring) (emphasis omitted). Thus, in determining whether a private right of action should be inferred from a statute, like Title VI, enacted well before *Cort*, the Court has given dispositive weight to Congress's expectations in light of the "contemporary legal context" when it enacted the statute. *Cannon*, 414 U.S. at 699 (opinion of the Court); see also *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378-382 (1982); *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 232 (1996) (opinion of Stevens, J.); *id.* at 240 (Breyer, J., concurring in judgment).

At the time Congress enacted Title VI, "the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule." *Merrill Lynch*, 456 U.S. at 374-375 (citation omitted); see, *e.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969). While the courts did occasionally refuse to recognize an implied remedy before *Cort*, they generally did so only when "the statute in question was a general regulatory prohibition enacted for the benefit of the public at large, or because there was evidence that Congress intended an express remedy to provide the exclusive method of enforcement." *Merrill Lynch*, 456 U.S. at 376.

2. When Title VI was enacted, courts had consistently recognized implied private rights of actions to enforce not only statutory prohibitions, but also regulatory provisions that validly implemented a statute. This Court recognized such a private right of action in *Borak*, *supra*, a case decided while the congressional debates on the 1964 Civil Rights Act were ongoing. *Borak* involved Section 14(a) of the Securities Exchange Act of 1934, which prohibited "any person * * * to solicit any proxy or consent or authorization in respect of any security" "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate." 15 U.S.C. 78n(a). The plaintiffs in *Borak* alleged that "the proxy solicitation material * * * circulated was false and misleading in violation of § 14(a) of the Act and Rule 14a-9 which the Commission had promulgated thereunder," 377 U.S. at 429, causing them injury. The Court acknowledged that Section 14(a) "makes no specific reference to a private right of

action," but reasoned that "among [the statute's] chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." *Id.* at 432. Although the SEC had authority to enforce its regulations regarding proxies administratively and through court actions, the Court held that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action." *Ibid.* That holding that individuals could enforce an SEC rule promulgated to enforce a statute was consistent with lower-court decisions permitting actions to enforce rules implemented by the SEC.[7]

Since *Borak*, this Court has continued to recognize implied private rights of action to enforce agency rules that implement statutes enacted before *Cort* v. *Ash*. In *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13 (1971), the Court accepted the longstanding consensus of the lower courts regarding a suit brought under Section 10(b) of the Securities Exchange Act of 1934, which makes it unlawful for any person to "use or employ, in connection with the purchase or sale of any security * * * any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe," 15 U.S.C. 78j(b), and the Commission's implementing regulation, Rule

[7] *See, e.g., Royal Air Properties, Inc.* v. *Smith*, 312 F.2d 210 (9th Cir. 1962); *Ellis* v. *Carter*, 291 F.2d 270 (9th Cir. 1961); *Matheson* v. *Armbrust*, 284 F.2d 670 (9th Cir. 1960), cert. denied, 365 U.S. 870 (1961); *Hooper* v. *Mountain States Sec. Corp.*, 282 F.2d 195 (5th Cir. 1960), cert. denied, 315 U.S. 814 (1961); *Fratt* v. *Robinson*, 203 F.2d 627 (9th Cir. 1953); *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952); *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951). See generally Louis Loss, *The SEC Proxy Rules in the Courts*, 73 Harv. L. Rev. 1041, 1049-1052 (1960). Outside the securities context as well, courts permitted individuals to enforce agency regulations implementing a statutory scheme. *See, e.g., Roosevelt Field* v. *Town of N. Hempstead*, 84 F. Supp. 456 (E.D.N.Y. 1949) (Air Commerce Act of 1926); *Neiswonger* v. *Goodyear Tire & Rubber Co.*, 35 F.2d 761 (N.D. Ohio 1929) (same).

10b-5. This Court has consistently treated the "Rule 10b-5" action as one brought under the regulation.[8]

The lower courts have correctly drawn from these cases the principle that, if an implied private right of action will lie to enforce a statute embodying a substantive prohibition, then an implied private right of action also exists to enforce valid legislative-type rules promulgated to implement the statute's substantive prohibition.[9] Of course, not all agency regulations implementing statutory proscriptions will be privately enforceable. For example, purely procedural rules that govern the duties of the recipient to the funding agency should not be enforceable. Thus, no implied private cause of action should be recognized to enforce a recipient's duty to file an Assurance of Compliance with the funding agency, see 28 C.F.R. 42.105(a)(1), because the individual is not mentioned with regard to that requirement and noncompliance with that procedural provision does not directly subject the individual to discrimination. But when a valid regulation effectuating a prohibition in a statute that was "enacted for the benefit of a special class," *Cannon*, 441 U.S. at 689, prohibits a recipient from taking actions against individuals in that class, and an implied action is available to enforce the

[8] See *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 291 (1993) ("The private right of action *under Rule 10b-5* was implied by the Judiciary on the theory courts should recognize private remedies to supplement federal statutory duties, not on the theory Congress had given an unequivocal direction to the courts to do so.") (emphasis added); see also *id.* at 297 ("right of action existing under Rule 10b-5"); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975) (addressing "the contours of a private cause of action under Rule 10b-5").

[9] *See, e.g., Lowrey* v. *Texas A & M Univ. Sys.*, 117 F.3d 242, 250 n.10, 253 n.20 (5th Cir. 1997); *Ashbrook* v. *Block*, 917 F.2d 918, 926 (6th Cir. 1990); *Polaroid Corp.* v. *Disney*, 862 F.2d 987, 994 (3d Cir. 1988); *Angelastro* v. *Prudential-Bache Sec., Inc.*, 764 F.2d 939, 947 (3d Cir.), cert. denied, 474 U.S. 935 (1985); *Robertson* v. *Dean Witter Reynolds, Inc.*, 749 F.2d 530, 536 (9th Cir. 1984).

statute, then individuals may enforce the regulation as well by private lawsuit.

3. The federal agencies' discriminatory-effect Title VI regulations promulgated pursuant to Section 602 are exactly the kind of substantive regulation that, at the time of the enactment of Title VI, Congress would have expected to be enforced through private right of action. The regulations are legislative-type rules that have the force and effect of law. Cf. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-303 (1979). The regulations are based on an express grant of authority by Congress, in Section 602; they were promulgated according to the proper procedures (including review by the President) and are substantively valid, under the Court's decision in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983);[10] and they affect individual rights and obligations.[11] Like the regulations adopted by the Securities and Exchange Commission to implement Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 at issue in *Bankers Life* and *Borak*, *supra*, the Title VI regulations give substantive content to a statutory proscription and have as much legal effect as a prohibition written in the statute itself.[12]

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[10] As we discuss in greater detail below (p. 36, *infra*), in *Guardians*, a majority of the Court concluded that federal agencies' Title VI discriminatory-effect regulations are valid exercise of agencies' authority under Section 602. See 463 U.S. at 584 (opinion of White, J.); *id.* at 608 n.1 (Powell, J., concurring in judgment) (recognizing this conclusion of majority); *id.* at 618-619 (Marshall, J., dissenting); *id.* at 642-645 (Stevens, J., dissenting). As we also note (pp. 34-35, *infra*) petitioners have waived any objection to the validity of the regulations.

[11] Congress clearly intended recipients' obligations to be governed by the regulations as well as Section 601's broad statutory duty. See pp. 38-41, *infra*.

[12] Moreover, contrary to petitioners' contention (Pet. Br. 46), there is nothing particularly unusual about private enforcement of federal agency regulations against state agents. Because valid federal agency regulations have the force and effect of law, the Supremacy Clause preempts any state or local laws that conflict with them, and such preemption claims have often been adjudicated in private lawsuits. See, *e.g.*, *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *Blum* v. *Bacon*, 457 U.S. 132, 145-146 (1982); cf. *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983); *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting). That is so even if, as petitioners contend, Title VI is solely an exercise of Congress's Spending Clause authority. See *Blum*, 457 U.S. at 145-146 (state regulation in program receiving federal funds preempted by contrary federal regulation); *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270 (1985) (generally applicable state law governing locality's use of funds is preempted as applied to federal funds given to locality with intent of vesting it with discretion); see also *Alabama NAACP State Conf. of Branches* v. *Wallace*, 269 F. Supp. 346, 349 (M.D. Ala. 1967) (three-judge court) (holding that state law that interfered with local school districts' compliance with Title VI guidelines was invalid under the Supremacy Clause).

Moreover, the Title VI regulations were plainly intended for the benefit of a "special class," within the meaning of the Court's earlier private right of action cases such as *Cannon* and *Borak*. Petitioners argue (Pet. Br. 37) that neither Title VI nor the agency regulations at issue here were enacted for the benefit of a class such as the persons represented by respondents because the statute is merely coextensive with the Fourteenth Amendment and does not specifically bar discrimination on the basis of English-language proficiency. That argument is without merit. In the first place, respondents have alleged that the unlawful discriminatory effect in petitioners' English-only policy is its discriminatory effect on the basis of national origin, and both Title VI and the regulations protect individuals against discrimination on the basis of national origin. The district court found that, in this case, petitioners' English-only policy had the effect of discrimination on the basis of national origin; it did not de-

clare language proficiency and national origin to be equivalent concepts as a matter of law.

Second, Title VI and the regulations are not phrased as "laws enacted for the protection of the general public"; rather, they have an "unmistakable focus on the benefited class" of persons protected against discrimination by recipients of federal funds. See *Cannon*, 441 U.S. at 690-691; see also *id.* at 704 (in Title VI, Congress wanted "to provide individual citizens effective protection against [discriminatory] practices"). Both the statute and the regulations are "declarative of a civil right" (*id.* at 692 n.12) to be free of discrimination. Indeed, this Court has never expressed doubt that the statutory proscriptions of Title VI may be enforced by private right of action, given that statute's focus on the individual right against discrimination.[13] The same is true of the substantive agency rules promulgated under Section 602, which, like the statute, protect individuals who are members of a certain class from being subjected to discrimination on the basis of their race, color, or national origin.[14]

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[13] In *Cannon*, where the Court concluded that Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, may be enforced through private right of action, the Court stressed that the prohibitions in Title IX against sex discrimination by education programs or activities receiving federal financial assistance were "patterned after Title VI." 441 U.S. at 694. Thus, while the holding of *Cannon* was technically limited to Title IX, *Cannon* has uniformly been read as acknowledging a private right of action to enforce Title VI as well. See *Lane* v. *Peña*, 518 U.S. 187, 191 (1996); *Guardians*, 463 U.S. at 639 (Stevens, J., dissenting); see also *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 419-421 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

[14] Unlike Section 601, which provides that "[n]o person * * * shall * * * be subjected to discrimination" on certain grounds, see 42 U.S.C. 2000d, the Title VI regulations state that "[a] recipient * * * may not * * * utilize criteria or other methods of administration which have the effect" of discrimination on certain grounds, 28 C.F.R. 42.104(b)(2). The difference in language between the two does not suggest any retreat from the statute's focus on individual rights. The regulation, promulgated under Section 602, is intended "to effectuate the provisions of" Section 601, see 42 U.S.C. 2000d-1, and so necessarily maintains the statute's focus on the individual right to be free from discrimination. In addition, the regulation is phrased in terms of protecting "*the class of individuals* to whom * * * such services, financial aid, benefits, or facilities will be provided under any such program," and "the *class of individuals* to be afforded an opportunity to participate in any such program." 28 C.F.R. 42.104(b)(2) (emphasis added). And the prohibition in the regulation is phrased in terms of subjecting "*individuals* to discrimination because of their race, color, or national origin" and "impairing accomplishment of the objectives of the program as respects *individuals* of a particular race, color, or national origin." *Ibid.* (emphasis added). Thus, like the statute, the regulation is framed not as a regulatory prohibition for the protection of the general welfare but as an individual right of members of a certain class to be free from discrimination.

B. Congress Preserved And Ratified The Private Right of Action To Enforce The Effects Test In The Civil Rights Restoration Act

In response to this Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), Congress engaged in a comprehensive review of federal civil rights legislation before enacting the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (Restoration Act). The Restoration Act rejected part of the *Grove City* decision by defining the term "program or activity" in Title VI and related statutes to include "all of the operations of" an entity, "any part of which is extended Federal financial assistance." § 6, 102 Stat. 31 (codified at 42 U.S.C. 2000d-4a). Congress did so in full awareness that regulations under Title VI and similar statutes, as amended by the Restoration Act, would be the subject of private enforcement actions.

1. Congress enacted the Restoration Act against a background of consistent judicial acceptance of private rights of

action to enforce Title VI and its regulations. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), a private lawsuit brought against a school district, this Court held that the district violated Title VI when it required Chinese-speaking students to attend public school but refused to tailor the curriculum to take into account the fact that they did not speak English. The majority relied on agency Title VI regulations and guidelines, explaining that "[b]y § 602 of the Act [the agency] is authorized to issue rules, regulations, and orders to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with § 601." *Id.* at 567 (footnote omitted). "Discrimination is barred which has that *effect* even though no purposeful design is present," the Court held, citing the discriminatory-effect regulation. *Id.* at 568. The Court concluded that "the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned *by the regulations*," *ibid.* (emphasis added), and remanded the case "for the fashioning of appropriate relief," *id.* at 569. In an opinion concurring in the judgment, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, made clear the case did not involve intentional discrimination, but rather a "fail[ure] to act in the face of changing social and linguistic patterns." *Id.* at 570. Those three Justices believed the school district had not violated Section 601 "standing alone," but had violated the agency's regulations and interpretive guidance, which they also concluded were "reasonably related to the purposes of the enabling legislation." *Ibid.* (citation omitted).

In *Guardians*, a private lawsuit for employment discrimination brought against a city agency, a majority of the Court concluded that the Title VI discriminatory-effect

regulations are valid, although a different majority also concluded that no compensatory relief could be awarded in a private suit for a violation of those regulations. Four Justices voted to reverse the judgment below and reinstate the relief awarded by the district court under the Title VI discriminatory-effect regulations. 463 U.S. at 623 n.15 (Marshall, J., dissenting); *id.* at 639-645 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). Justice White, although voting to affirm the judgment setting aside the relief (and providing the fifth vote to do so), also concluded that the agency discriminatory-effect regulations were valid. *Id.* at 589-590, 584 n.2.

This Court subsequently reexamined private litigation to compel compliance with another Title VI regulation in *Bazemore* v. *Friday*, 478 U.S. 385 (1986). In that case, private plaintiffs alleged that a recipient of federal funds had not complied with a Department of Agriculture Title VI regulation "requiring the [defendant] to take 'affirmative action' to overcome the effects of prior discrimination in its programs." *Id.* at 408 (opinion of White, J.). A majority of the Court implicitly endorsed the existence of a private right of action, by adjudicating the claim on the merits, holding that "we cannot accept petitioner's submission that the regulation has been violated." *Id.* at 409 (opinion of White, J.).

Thus, when Congress reexamined civil rights enforcement and enacted the Restoration Act, this Court had at least three times reviewed the merits of private lawsuits to enforce the Title VI regulations, including one case (*Lau*) in which the plaintiffs' claim was upheld on the merits. In addition, the courts of appeals after *Guardians* consistently found an implied right of action to enforce the discriminatory-effect regulations.[15] At the time of Con-

[15] See *David K.* v. *Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1044-1045 (7th Cir. 1987);

gress's enactment of the Restoration Act, therefore, the existence of a private right of action to enforce discriminatory-effect regulations was settled law.

2. When Congress amends a statute, it is presumed to be familiar with this Court's relevant decisions on the topic, and is also assumed to consider those decisions in amending the statute. See *McCarthy* v. *Bronson*, 500 U.S. 136, 140 (1991); *Conroy* v. *Aniskoff*, 507 U.S. 511, 516 (1993). The legislative history of the Restoration Act, moreover, reflects Congress's understanding that private plaintiffs would be able to sue recipients of federal funds for violations of the regulations. Witnesses at the congressional hearings explained that agency discriminatory-effect regulations could be enforced in federal court by private parties.[16] With regard to the Title VI discriminatory-effect regulations specifically, Senator Hatch argued that "[t]he failure to provide a particular share of contract opportunities to minority-owned businesses * * * could lead Federal agencies to undertake

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Latinos Unidos de Chelsea en Accion v. *Secretary of HUD*, 799 F.2d 774, 785 n.20 (1st Cir. 1986); *Castaneda by Castaneda* v. *Pickard*, 781 F.2d 456, 465 n.11 (5th Cir. 1986); *Georgia State Conference of Branches of NAACP* v. *Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. by Lucille P.* v. *Riles*, 793 F.2d 969, 981-982 (9th Cir. 1984).

[16] See *Civil Rights Restoration Act of 1987: Hearings Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. 640-641 (1987) (Prof. John H. Garvey) (*1987 Senate Labor Comm. Hearings*); *Civil Rights Restoration Act of 1985: Joint Hearings Before the House Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 570-571 (1985); *Civil Rights Act of 1984: Hearings Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. Pt. 2, at 42 (1984) (Prof. Charles Fried); *Civil Rights Act of 1984: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 142, 149 (1984) (Prof. Fried); *id.* at 423 (Center for Judicial Studies); see also *1987 Senate Labor Comm. Hearings*, *supra*, at 209, 238, 304.

enforcement action asserting that the failure to provide more contracts to minority-owned firms, standing alone, is discriminatory under agency disparate impact regulations implementing Title VI. * * * *Of course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges.*" 134 Cong. Rec. 4257 (1988) (emphasis added).

The Executive Branch put forward the same understanding of the effect of the Restoration Act. A memorandum from the Office of Management and Budget submitted during the hearings, quoting the Department of Education's discriminatory-effect regulations, explained that "bar exams, medical boards, teacher competency exams, and a host of similar standards alleged by advocacy groups to have 'discriminatory effects' would now be covered *by the existing regulations* for the first time and would be subject to agency enforcement activities *and private lawsuits*." *Civil Rights Act of 1984: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 530 (1984) (second emphasis added). The memorandum reiterated that expanding the definition of "program" would "open up all of a recipients' [*sic*] activities to private suits over practices deemed to have 'discriminatory effects,'" brought by "members of the bar" acting as "private Attorneys General." *Id.* at 532.

Congress therefore understood that a discriminatory-effect regulation could be enforced by private parties and with that understanding nonetheless "restored" the scope of the statute to what Congress perceived as its pre-*Grove City* breadth. If Congress had intended by the 1988 amendment to expand the scope of the statute's coverage but not to extend the privately enforceable discriminatory effects standard, one would expect some indication in the legislative history to that effect. There is none. To the contrary, the legislative history makes clear that Congress did not intend

to alter settled law on the substantive definition of "discrimination." See S. Rep. No. 64, 100th Cong., 1st Sess. 29 (1987).

The Restoration Act's failure to preclude or limit private rights of action cannot be viewed as simple inaction. Congress amended Title VI after significant debate but did not preclude a private right of action. The circumstances of this case are thus analogous to those in *Merrill Lynch*, *supra*. That case involved private suits to enforce the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, which also does not contain an express private right of action. Without determining whether implying a private right of action would comport with *Cort* v. *Ash*, the Court recognized the existence of such an action because at the time that Congress amended other parts of the statute (although not the particular provision from which the cause of action arose), "the federal courts routinely and consistently had recognized an implied private cause of action on behalf of plaintiffs seeking to enforce and to collect damages for violation of provisions of the CEA or rules and regulations promulgated pursuant to the statute." 456 U.S. at 379. The presumption that Congress knows the law, *ibid.*, coupled with the fact that Congress had been put on notice at the hearings regarding private enforcement of the statute, *id.* at 383-384, permitted the Court to conclude that Congress was "familiar" with the "implied private remedy." *Id.* at 382. "In that context, the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy." *Id.* at 381-382.

C. The Procedures Identified In Section 602 For Agency Enforcement Of The Regulations Do Not Manifest An Intent To Preclude Private Enforcement

1. Petitioners argue (Pet. Br. 24-25, 27-29) that Section 602, which sets forth procedural steps the United States must take before it may bring suit or terminate federal financial assistance based on a violation of agency Title VI regulations, expressly precludes private enforcement of those regulations.[17] That argument is incorrect. Section 602 is plainly directed at the federal government's enforcement of the Title VI regulations; it has no application to private

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[17] After authorizing the promulgation of regulations, Section 602 provides:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. 2000d-1.

rights of action at all. Because Congress did not expressly address the issue of private rights of action to enforce Title VI when it enacted that legislation, but rather assumed, in accordance with the state of the law at the time, that the courts would determine whether such a cause of action should be fashioned (see pp. 15-17, *supra*), Section 602's prerequisites for federal agency enforcement of regulations cannot be read as an expression of congressional intent to limit the scope of an implied private right of action.

Moreover, the purposes served by the procedural requirements in Section 602 have little application to private lawsuits. Many of the procedural conditions imposed by Section 602—such as the requirement of an express finding of violation after a hearing, a report to Congress, and a 30-day waiting period—apply only to the termination of or refusal to grant or to continue federal financial assistance. Those requirements are designed to ensure that the "severe" (*Cannon*, 441 U.S. at 705) action of funding termination is taken only after careful agency deliberation, in light of Congress's concern that valuable programs be provided with federal assistance. The remedy of funding termination, however, is not available to private individuals suing a recipient of federal funds. See *Powell* v. *Ridge*, 189 F.3d 387, 398 (3d Cir.), cert. denied, 120 S. Ct. 579 (1999).

For the United States to initiate judicial action to obtain prospective compliance with an agency regulation, Section 602 requires that the agency concerned has (1) "advised the appropriate person or persons of the failure to comply with [the] requirement" and (2) "has determined that compliance cannot be secured by voluntary means." 42 U.S.C. 2000d-1. One purpose of those prerequisites to initiating suit is to reduce the risk that the federal government's resources in litigation would overwhelm those of recipients. See *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 420 n.26 (1978) (Stevens, J., concurring in the judgment in part and

dissenting in part). That particular concern is not applicable to private causes of action, which do not "bring[] the forces of the Executive Branch to bear on state programs." *Ibid.*[18]

In addition, the Court has looked to analogous notice provisions under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, for guidance in determining the proper scope of *relief* that may be awarded in a private cause of action. See *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288-291 (1998). But the Court has never suggested that those procedural limitations on government action should be transplanted *in toto* to the private right of action. *Gebser* merely found in those requirements an indication that Congress did not intend to authorize municipal liability in damages for conduct that had not been brought to the attention of the responsible policymakers—a principle not

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[18] Section 602 is thus similar to other provisions that require the government to notify or consult with a defendant, including a state or local agency, before bringing suit, even though private litigants have no such obligation. For example, Title IV of the Civil Rights Act of 1964 permits the Attorney General to bring suit against a public educational institution based on the deprivation of the equal protection of the laws only if she has given notice to the appropriate institution and has determined that the institution has had a reasonable time to adjust the wrongful condition, 42 U.S.C. 2000c-6(a), but private parties are not required to provide any such notice before bringing suit under 42 U.S.C. 1983 against a public educational institution. Similarly, the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, requires that the Attorney General, when bringing suit to obtain relief from a pattern or practice of the deprivation of the civil rights of certain institutionalized persons, such as residents of psychiatric treatment institutions, certify to the court that, before filing the action, she notified an appropriate official of the alleged wrongful conditions and made a reasonable good faith effort to consult with officials about means to correct those conditions. 42 U.S.C. 1997b(a). Residents of such institutions, however, may bring suit for relief against alleged wrongful conditions under Section 1983 without exhausting state administrative remedies. See *Patsy* v. *Board of Regents*, 457 U.S. 496 (1981).

applicable here because this case involves neither damages liability nor conduct unknown to the relevant policymarkers.

Moreover, by authorizing the United States to obtain compliance with "*any* requirement adopted pursuant to this section," Section 602 makes clear that, even in cases involving intentional discrimination, the United States will be enforcing agency regulations effectuating Section 601. If petitioners were correct that any duty subject to Section 602's prerequisites could not be privately enforced because Congress wanted only agency enforcement of these requirements, then this Court's decision in *Cannon* could not be sustained. *Cannon*, in considering the provisions of Title IX that are "patterned after Title VI" (441 U.S. at 684), upheld a private cause of action to enforce the same nondiscrimination duty in Section 901 of Title IX, 20 U.S.C. 1681, which agencies enforce through Section 902, 20 U.S.C. 1682. *Cannon* made clear that private complainants are not required to exhaust administrative remedies before bringing a lawsuit under Title IX for injunctive relief from sex discrimination because private complainants have no role in the administrative proceedings. See 441 U.S. at 707-708 n.41.

2. Nor will a private right of action interfere with effective administrative enforcement of Title VI regulations. As was the case in *Lau*, *Bakke*, and *Cannon*, the United States "perceives no inconsistency between the private remedy and the public remedy." *Cannon*, 441 U.S. at 706-707; see also *Bakke*, 438 U.S. at 419-420 (Stevens, J., concurring in the judgment in part and dissenting in part); *Allen*, 393 U.S. at 557 n.23. Federal agencies have historically relied on private persons to act as "private attorney[s] general" to ensure optimal enforcement of the Title VI regulations. Cf. *Newman* v. *Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam). We are not aware of any information suggesting that private enforcement has impaired federal agencies' administration of their Title VI regulations.

To the contrary, private enforcement provides a necessary supplement to government enforcement not only of Title VI itself but also of the regulations. For example, the regulations, but not the statute, prohibit retaliation against an individual who files a Title VI complaint with a federal agency alleging discrimination by a federal funding recipient. See 28 C.F.R. 42.107(e); 49 C.F.R. 21.11(e). Protection against retaliation, however, is a critical component of a statutory scheme that depends on the filing of complaints. Cf. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 345-346 (1997) (noting "persuasive" agency support for effective anti-retaliation provisions to ensure protection of anti-discrimination laws). Under petitioners' theory, individuals who believe they have suffered retaliation would have no judicial cause of action to enforce the prohibition against retaliation, and would have to seek agency enforcement to complain to federal agencies about discrimination. But because an agency may decide not to investigate a complaint "based on a lack of enforcement resources, rather than on any conclusion on the merits of the complaint," *Cannon*, 441 U.S. at 707 n.41, the regulations' prohibition against retaliation could not ensure protection for individuals who file complaints of discrimination. Unsurprisingly, therefore, courts have uniformly permitted private parties to sue funding recipients to enforce the rights, secured by regulation, to be free from retaliation. See *Lowrey* v. *Texas A & M Univ. Sys.*, 117 F.3d 242, 250-254 (5th Cir. 1997); *Preston* v. *Virginia*, 31 F.3d 203, 206 n.2 (4th Cir. 1994).

Moreover, should a private lawsuit raise novel questions about the interpretation or application of Title VI regulations, a federal court may invite the pertinent agency to participate as amicus curiae or otherwise in the court proceedings. See *Rosado* v. *Wyman*, 397 U.S. 397, 406-407

(1970); *Cannon*, 441 U.S. at 688 n.8. Federal Rule of Civil Procedure 24(b) also authorizes intervention by a federal agency, upon timely application, whenever a party to an action relies on an agency regulation for a claim or defense. And Federal Rule of Appellate Procedure 29(a) permits the filing of an amicus curiae brief by the United States without need for the consent of the parties or leave of court. We perceive little danger, therefore, that courts will enforce agency regulations without the benefit of agency expertise and interpretations of those regulations.

D. Implication Of A Private Right Of Action For Injunctive Relief Does Not Contravene Any Rule Of Statutory Construction Requiring A "Plain Statement" Or "Notice"

Petitioners contend (Br. 20-30, 33-37) that, because Title VI is Spending Clause legislation, this Court may not imply a private right of action to enforce *any* of its provisions, statutory or regulatory, against a state or local recipient of federal funds. That argument is irreconcilable with this Court's decisions and erroneously conflates several independent legal doctrines.

State agencies that receive federal funds are entitled to notice that Congress or a federal agency has attached legal obligations as substantive conditions to the acceptance of federal money. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). That requirement of notice is satisfied in this case. Agency regulations in force for more than 30 years have made clear that recipients of federal money may not administer programs in a way that subjects individuals to the effect of discrimination based on national origin.[19] And once that requirement of notice has

[19] Nor, contrary to petitioners' contention (Pet. Br. 33, 38-39) is there anything particularly unclear about the discriminatory-effect regulations at issue in this case. The lower courts correctly borrowed well-settled principles from "disparate impact" employment-discrimination cases under Title VII of the Civil Rights Act of 1964 to determine whether petitioners' English-only policy had an unjustified discriminatory effect on the basis of national origin. See Pet. App. 52a-54a; see also *Board of Educ.* v. *Harris*, 444 U.S. 130, 151 (1979) (analogizing from Title VII case law an "educational necessity" justification under statute proscribing disparate racial impact in educational setting). Nor did this case turn on whether petitioners had taken "reasonable" steps to provide information to beneficiaries about their program, the driver's license examination, in languages other than English (Pet. Br. 38-39), for it is undisputed that petitioners provided *no* access to the driver's license examination in any language other than English.

been satisfied, the exact scope of the anti-discrimination obligation presents a straightforward matter of statutory and regulatory interpretation. See *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 643, 650 (1999); *Honig* v. *Doe*, 484 U.S. 305, 325 n.8 (1988); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987); *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985).

This Court's decisions establish no requirement that recipients of federal funds *also* be given a "clear statement" in a statute as to exactly how their substantive legal obligations will be enforced. Such a requirement could not be reconciled with the very nature of an implied right of action, which by definition is not made express in the text of a statute. Yet the Court has long accepted that a private right of action may be implied against a public recipient of federal funds. See, *e.g.*, *Franklin* v. *Gwinett County Pub. Schs.*, 503 U.S. 60, 65-66 (1992) (Title IX); *Lane* v. *Peña*, 518 U.S. 187, 191-192 (1996); cf. *Allen*, *supra* (implying private right of action against State covered by Section 5 of the Voting Rights Act of 1965).

The Court has tailored *remedies* under implied rights of action to ensure that recipients of federal funds will have notice that they could be held liable for the specific conduct

at issue in a case. The Court has, for example, precluded the award of money damages in a private right of action under Title IX when the recipient of federal funds had no actual knowledge that discriminatory conduct was occuring in its programs, in order to avoid subjecting the recipient to monetary liability years after it received the federal financial assistance, and in an amount potentially greater than that assistance. See *Davis*, 526 U.S. at 639-640; *Gebser*, 524 U.S. at 287; see also *Guardians*, 463 U.S. at 598 (opinion of White, J.) (concluding that damages are not available in private right of action under Title VI unless intentional discrimination is shown). When the only relief sought is a prospective injunction, however, no such problem of notice is presented. Once the court case is concluded on the merits and the court has issued an injunction embodying the parties' rights and responsibilities, the recipient has notice of its ongoing duties and retains the option of terminating the federal financial assistance in order to avoid further liability in the future. See *id.* at 596-597 (opinion of White, J.). The contractual nature of the arrangement is thus preserved without distorting the fabric of statutory interpretation.

II. FEDERAL AGENCY REGULATIONS PROHIBITING RECIPIENTS OF FEDERAL AID FROM ADMINISTERING PROGRAMS WITH DISCRIMINATORY EFFECTS ARE VALID MEASURES TO EFFECTUATE TITLE VI

In addition to arguing that agencies' discriminatory-effect Title VI regulations may not be enforced by private right of action, petitioners also appear to challenge the validity of those regulations. See Pet. Br. 26-27, 30, 45.[20] That issue is

[20] Petitioners also appear to question the lower courts' application of those regulations to the facts of this case. See Pet. Br. 6-10, 36-39. That issue is not properly before this Court, as petitioners did not present it as

not fairly included within the only question presented by the certiorari petition, namely, whether a private right of action will lie to enforce those regulations. See Pet. i. Nor was that issue properly preserved in the lower courts, where petitioners not only failed to present a challenge to the regulations, but expressly conceded their validity. See pp. 7-8 & note 4, *supra*. Accordingly, this Court should decline to consider petitioners' belated challenge to the regulations.[21]

In any event, petitioners' challenge to the regulations is without merit. In *Guardians*, a majority of the Court concluded that the Title VI discriminatory-effect regulations are valid. Petitioners' suggestions that this Court is not bound by that holding or that it should be overruled are untenable. This Court's Title VI decisions, the statute's text, structure,

a question presented in their certiorari petition (see Pet. i). Two observations are appropriate, however, in response to petitioners' assertions. First, although petitioners point out (Pet. Br. 7) that Congress has required applicants for naturalization to demonstrate understanding of English, Congress has not made—and, as far as we are aware, has never made—proficiency in English a requirement for an individual such as respondent Sandoval to obtain legal permanent residence in this country. Since the ability to drive is a "virtual necessity" for most people residing in this country, see *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977), it seems likely that Congress anticipated that aliens lawfully residing here would be able to drive without demonstrating proficiency in English. Second, petitioners point out (Pet. Br. 7-8) that federal agencies have required persons engaged in certain inherently dangerous activities, such as operators of *commercial* motor vehicles, seamen, and pilots, to demonstrate some working knowledge of English. But as the district court observed (Pet. App. 236a-238a), those activities are much more closely regulated, and involve much greater concerns about public safety, than the use of an ordinary driver's license.

[21] See *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (Court will not address claims raised by petitioners that are not fairly included within question presented in certiorari petition); *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (this Court will ordinarily not address a basis for reversal not raised in the lower courts).

and legislative history, and Congress's subsequent legislative actions all show that the discriminatory-effect regulations are valid.

A. This Court Has Upheld Federal Agencies' Discriminatory-Effect Regulations Under Title VI

There can be no serious dispute that this Court has ruled that agency regulations validly prohibit recipients of federal funds from conducting programs in a manner with a discriminatory effect, even if Title VI itself prohibits only intentional discrimination. A majority of the Court so concluded in *Guardians*. 463 U.S. at 592 (opinion of White, J.); *id.* at 617-624 (Marshall, J., dissenting); *id.* at 642-645 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). In *Alexander* v. *Choate*, 469 U.S. 287, 293 (1985), the Court stated that it "held [in *Guardians*] that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." That holding was also consistent with the Court's earlier decision in *Lau*, where the Court ordered the entry of prospective relief against a recipient of federal funds based on a violation of discriminatory-effect regulations, even in the absence of a finding of discriminatory intent. See 414 U.S. at 568.[22]

[22] Petitioners argue (Pet. Br. 41-42) that *Lau* was overruled by *Bakke*, which held that Section 601 reaches no farther than the Equal Protection Clause. But that was precisely the question before the Court in *Guardians*, in which a majority of the Court resolved the issue by concluding that *Lau* remained good law and on that basis upheld the discriminatory-effect regulations as a valid implementation of Title VI. Compare 463 U.S. at 589-591 (opinion of White, J.) (*Bakke* did not overrule *Lau*); *id.* at 617-618, 622-623 (Marshall, J., dissenting) (*Lau* survives *Bakke*); and *id.* at 643 (Stevens, J., dissenting) (relying on continuing validity of *Lau*) with *id.* at 611 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment) (*Bakke* did overrule *Lau*); and *id.* at 615 (O'Connor, J., concurring in the judgment) (*Bakke* requires overruling of *Lau*).

Petitioners also contend (Pet. Br. 44-45) that *Lau*, *Guardians*, and *Choate* were all overruled by a footnote in *United States* v. *Fordice*, 505 U.S. 717, 732 n.7 (1992). *Fordice*, however, did not involve the question whether Title VI discriminatory-effect regulations are valid. Rather, it involved a claim under Title VI and a regulation that required recipients to "take affirmative action to overcome the effects of prior [intentional] discrimination." *Ibid.* (quoting 34 C.F.R. 100.3(b)(6)(i) (1991)). This Court had previously interpreted that regulation to be merely co-extensive with the Constitution's requirements for redressing the continuing effect of past *de jure* discrimination. See *Bazemore* v. *Friday*, 478 U.S. 385, 408-409 (1986) (opinion of White, J.) (deferring to United States' interpretation of regulation); U.S. Br. at 38 n.41, *Bazemore* v. *Friday*, Nos. 85-93 & 85-428 ("the regulation simply embodies this * * * constitutional requirement"). Because in *Fordice* no party relied on an agency regulation that went further than Section 601 itself (such as the discriminatory-effect regulations at issue in this case), it was not surprising that the Court stated in *Fordice* that "the reach of Title VI's protection extends no further than the Fourteenth Amendment." 505 U.S. at 732 n.7.

Principles of *stare decisis* counsel strongly against unraveling more than 25 years of precedent involving Title VI regulations promulgated 36 years ago, only months after the enactment of Title VI itself. "[*S*]*tare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). This Court's special "reluctance to overturn [non-constitutional] precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress," for Congress is free to correct the Court's interpretation of the laws it passes or the regulations enacted by federal agencies. *Neal* v. *United States*, 516 U.S. 284, 295 (1996). No "special justification" (*Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)) warranting the dramatic

change of course proposed by petitioners is present here. Quite the opposite is true. As we now show, the holding of *Guardians* was correct when decided and has been ratified by subsequent congressional activity.

B. The Discriminatory-Effect Regulations Are Consistent With The Text And Legislative History Of Title VI

1. The *Guardians* holding is well grounded in the language and structure of Title VI. Section 602 directs each agency empowered to extend federal financial assistance "to effectuate the provisions of [Section 601] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." The regulations prohibiting discriminatory effects still have the force and effect of law since they are not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The statute's grant of authority to promulgate rules to "effectuate" Title VI is a broad grant of power. It authorizes agencies not only to define what actions constitute "discrimination," but also to make effective the prohibition by establishing mechanisms to ensure that such discriminatory actions are no longer engaged in by programs or activities that receive federal funds.

The legislative history of Title VI confirms that Congress expected the agencies to promulgate legislative-type rules defining not only procedural requirements, but also practices that would be substantively prohibited. During the Senate Hearings on the Civil Rights Act, Senator Ervin observed that the agencies would be writing definitions of the term "discrimination" and "prescribing the acts and omissions which shall constitute illegal discrimination."

Civil Rights—The President's Program, 1963: Hearings Before the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 398 (1963) (*1963 Senate Judiciary Comm. Hearings*). Attorney General Kennedy agreed with Senator Ervin that it would be up to the administrator of each agency to write rules setting out "not only what constitutes discrimination in their programs but also what acts or omissions are to be forbidden," *id.* at 399-400. Senator Ervin then inquired whether the regulations would have "the force and effect of law," and the Attorney General responded: "That is correct, Senator." *Id.* at 400.[23] The floor debates also made clear Congress's understanding that agencies would "establish nondiscrimination standards" and would define the term "discrimination" in their rules, and that a violation of the regulations would give rise to liability.[24] Indeed, it was precisely the "latitude" granted to the agencies that led Congress to require that the President approve each agency's Title VI regulations.[25]

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[23] Attorney General Kennedy similarly observed in the House hearings that Section 601 states a "general criterion" of non-discrimination and that the agencies "will establish the rules that will be followed in the administration of the program—so that the recipients of the program will understand what they can or cannot do." *Civil Rights: Hearings Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. Pt. 4, at 2740 (1963) (*1963 House Judiciary Comm. Hearings*); see also *id.* at 1890, 2703, 2766; *Civil Rights: Hearings Before the House Comm. on Rules*, 88th Cong., 2d Sess. Pt. 2, at 321-322 (1964) (*1964 House Rules Comm. Hearings*) (remarks of Rep. Celler, the sponsor in the House); *id.* at 330, 336, 434, 437-438, 447.

[24] See 110 Cong. Rec. 1519 (1964) (Rep. Celler); *id.* at 1632 (Rep. Dowdy); *id.* at 6049 (Sen. Talmadge); *id.* at 6050 (Sen. Javits); *id.* at 12,320 (Sen. Byrd); *id.* at 13,130 (Sen. Gore); *id.* at 9083-9084 (Sen. Gore); *id.* at 2468 (Rep. Rodino); *id.* at 12,715 (Sen. Humphrey).

[25] See 110 Cong. Rec. 2499 (1964) (Rep. Lindsay). In addition, the legislative history of Title VI yields repeated references to broad prophylactic purposes for that statute—to "prevent," "preclude," "end," or

2. This evidence from the legislative history suggests at least two purposes to be served by permitting federal agencies to adopt regulations that bar recipients of federal funds from engaging in actions that have the effect of subjecting individuals to discrimination. First, a regulation prohibiting discriminatory effects is appropriate to detect a violation where facially neutral criteria may be used, at least in part, as a subterfuge for intentional discrimination. Congress was aware of strenuous covert resistance to this Court's non-discrimination decisions involving voting, education, and public services. Such concealed intentional discrimination, combined with persistent "subconscious stereotypes and prejudices," has led Congress to make unlawful practices that can "in operation be functionally equivalent to intentional discrimination," despite the inability of a plaintiff to prove discriminatory intent. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987, 990 (1988), see also *City of Rome* v. *United States*, 446 U.S. 156, 174, 177 (1980).

Second, the discriminatory-effect standard recognizes the continuing repercussions of past intentional discrimination and seeks to ensure that programs accepting federal money are not administered in a way that perpetuates those effects. As the Court has explained, the disparate racial impact of certain actions may well be traceable to the long history of invidious race discrimination. See *Griggs* v. *Duke Power Co.*,

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"get away from" discrimination; to "insure" or "make sure" that discrimination does not occur; to avoid the use of funds to "perpetuate" or "cause" discrimination; and to prevent the use of funds in a way that discriminates. See, *e.g.*, *1963 House Judiciary Comm. Hearings*, *supra*, at 2683-2684, 2774; *1964 House Rules Comm. Hearings*, *supra*, at 94, 321, 330, 336, 343, 346-348, 422; *1963 Senate Judiciary Comm. Hearings*, *supra*, at 328, 330, 397-403, 413; 110 Cong. Rec. 1519-1520, 1527-1528 (1964) (Rep. Celler); *id.* at 1542 (Rep. Lindsay); *id.* at 1599 (Rep. Minish); *id.* at 1613 (Rep. Meader); *id.* at 1629 (Rep. Halpern); *id.* at 1677 (Rep. Celler); *id.* at 2595 (Rep. Donahue); *id.* at 6562 (Sen. Kuchel); *id.* at 7065 (Sen. Ribicoff).

401 U.S. 424, 430-431 (1971); see also *City of Rome*, 446 U.S. at 176-177; *Gaston County* v. *United States*, 395 U.S. 285, 297 (1969).

In crafting regulations to "effectuate" a prohibition on discrimination, as authorized by Congress in Section 602, agencies may also take cognizance of the well-recognized point that "an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one race than another." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). The long history of discrimination on the basis of race and national origin, the close (albeit not inevitable) correlation between discriminatory intent and disparate effects, and the difficulty in many circumstances of proving intent together are sufficient to justify a rule that prohibits recipients of federal funds from administering programs with a discriminatory effect, in the absence of proof of untainted and legitimate justifications for that discriminatory effect. Cf. *United States* v. *O'Hagan*, 521 U.S. 642, 676 (1992) (upholding "prophylactic" agency regulations intended to mitigate "proof problem[s]"). That is particularly true given the breadth of authority granted the Executive Branch in Section 602 and the fact that the regulations (a) represent the longstanding and consistent view of the federal government, promulgated only months after the enactment of the statute, (b) were crafted in part by the Attorney General, who assisted in drafting Title VI, and (c) were personally approved by the President himself.

C. Congress Has Ratified The Discriminatory-Effect Regulations

1. Congress has consistently given close attention to agencies' enforcement of their Title VI regulations. In 1966 and 1967, Congress reviewed the Department of Health, Education and Welfare's (HEW) implementation of its Title VI regulations, including a regulation to the effect that

school districts subject to a court order of desegregation would be deemed to be in compliance with Title VI as long as they provided an assurance that they were in compliance with the court order.[26] In response to reports that HEW intended to modify that regulation, Congress enacted the regulatory language almost verbatim into law as part of the Elementary and Secondary Education Amendments of 1967.[27] Congress also investigated HEW's practice of deferring decisions on applications for new funds based on noncompliance with Title VI and imposed statutory time limits on agency decision-making.[28] But despite that active monitoring and legislative involvement in HEW's implementation of Title VI, in 1966 the House rejected a proposal to amend Title VI to prohibit only intentional discrimination, see 112 Cong. Rec. 18,715 (1966), and the proposal never emerged

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[26] 45 C.F.R. 80.4(c)(1) (1964); see *Guidelines for School Desegregation: Hearings Before the Special Subcomm. on Civil Rights of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 104-111 (1966); *Proposed Cutoff of Welfare Funds to the State of Alabama: Hearings Before the Senate Comm. on Finance*, 90th Cong., 1st Sess. (1967); *Policies and Guidelines for School Desegregation: Hearings Before the House Comm. on Rules*, 89th Cong., 2d Sess. (1966) (*1966 House Rules Comm. Hearings*); *U.S. Office of Education: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 89th Cong., 2d Sess. 661-773 (1966).

[27] See Pub. L. No. 90-247, § 112, 81 Stat. 787 (codified as the proviso in 42 U.S.C. 2000d-5).

[28] See *1966 House Rules Comm. Hearings*, *supra*, at 39, 90-91, 103 (investigating HEW's practice); Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, Tit. I, § 182, 80 Stat. 1209 (codified at 42 U.S.C. 2000d-5) (imposing limits on HEW's deferral practices); see also Elementary and Secondary Education Amendments of 1969, Pub. L. No. 91-230, § 2, 84 Stat. 121 (1970) (codified at 42 U.S.C. 2000d-6(a)) (expressing federal policy that "guidelines and criteria established pursuant to title VI * * * shall be applied uniformly in all regions of the United States").

from committee in the Senate. See *Guardians*, 463 U.S. at 620 n.8 (Marshall, J., dissenting) (summarizing legislative history).

But Congress did not simply acquiesce in the Title VI regulations; it affirmatively embraced them. In 1974, Congress manifested its approval of this Court's decision in *Lau* directing the entry of relief based on agency discriminatory-effect regulations by enacting the Bilingual Education Act, Pub. L. No. 93-380, 88 Stat. 503 (currently codified as subsequently amended at 20 U.S.C. 7401 *et seq.*). In that Act, Congress found that "the Federal Government, as *exemplified by title VI of the Civil Rights Act of 1964* * * *, has a special and continuing obligation to ensure that States and local school districts take appropriate action to provide equal educational opportunities to children and youth of limited English proficiency," 20 U.S.C. 7402(a)(15) (emphasis added), and provided funds to assist school districts in providing bilingual education to comply with *Lau*. See H.R. Rep. No. 805, 93d Cong., 2d Sess. 69 (1974); S. Rep. No. 763, 93d Cong., 2d Sess. 44-45 (1974).

Congress also enacted several statutes after *Lau* that specifically required agencies to promulgate regulations "similar" to those under Title VI. Three statutes required agencies to ensure that no person is "excluded from receiving [benefits], or participating in any activity" under the program at issue "because of" or "on the grounds of" race, creed, color, national origin or sex, and required agencies to promulgate "rules" or "regulations" that "shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964."[29] Another four statutes

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[29] See 15 U.S.C. 719o (enacted 1976); 49 U.S.C. 47123 (enacted 1976, reenacted in 1982 and 1994); 43 U.S.C. 1863 (enacted 1978); see also Pub. L. No. 93-153, § 403, 87 Stat. 590 (1973). The regulations that define "dis-

provided that a prohibition on sex discrimination in federally-assisted programs "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964."[30] Especially when viewed in light of this Court's reliance on the discriminatory-effect regulation in *Lau*, 414 U.S. at 568, those statutes clearly ratify the Title VI regulations, including the discriminatory-effect standard.

Congress also used Title VI as a model for later civil rights statutes that broadly prohibit discrimination in programs and activities receiving federal financial assistance. In Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, Congress intended that the effectuating regulations be modeled on existing Title VI regulations. See *Grove City*, 465 U.S. at 575; *Cannon*, 441 U.S. at 696. Congress extensively reviewed proposed Title IX regulations and actually amended the statute to curb what it perceived as regulatory excesses, see *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 531-535 (1982), but it took no action in regard to agency regulations prohibiting discriminatory effects, despite objections having been raised.[31]

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crimination" under those statutes prohibit discriminatory effects. See 43 C.F.R. 27.3(b)(4); 49 C.F.R. 27.7(b); 43 C.F.R. 34.4(b)(3)(viii).

[30] See 15 U.S.C. 775 (enacted 1974); 42 U.S.C. 5891 (enacted 1974); 40 U.S.C. 476 (enacted 1976); 42 U.S.C. 6709 (enacted 1976); see also Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 13, 86 Stat. 903 (enacted 1972); 23 U.S.C. 324 (enacted 1973). Regulations that define "discrimination" promulgated under these statutes likewise prohibit discriminatory effects. See 10 C.F.R. 1040.13(c); 10 C.F.R. 4.12(b); 23 C.F.R. 200.5(f); 40 C.F.R. 12.4(b)(2) (1974).

[31] See 121 Cong. Rec. 21,512 (1975) (Sen. Helms); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong., 1st Sess. 249, 551-552 (1975).

Regulations promulgated to effectuate Section 504 of the Rehabilitation Act, 29 U.S.C. 794, which prohibits discrimination on the basis of disability in programs or activities receiving federal financial assistance, also demonstrate Congress's acceptance of the Title VI discriminatory-effect regulations. While Section 504 was modeled on Section 601 of Title VI, Congress did not include a provision analogous to Section 602 that expressly authorized agencies to promulgate regulations to effectuate the prohibition. But even absent such statutory language, this Court held that Congress intended the federal agencies distributing federal financial assistance to bear the "important responsibility" of determining what "amounts to discrimination against the handicapped," *Southeastern Community College* v. *Davis*, 442 U.S. 397, 413 (1979); see also *Alexander*, 469 U.S. at 304 n.24. This Court has also observed that "Congress itself endorsed the regulations in their final form," *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984), which it did at a time when they included a regulation modeled on the Title VI discriminatory-effect regulations, 45 C.F.R. 84.4(b)(4)(ii). Thus, there can be no doubt that Congress perceived the discriminatory-effect regulations as fully consistent with the statute.

2. Congress's actions after this Court's decision in *Guardians* likewise show that it has ratified the discriminatory-effect regulations. As we have explained (pp. 21-26, *supra*), in 1988, after several years of deliberations, Congress amended Title VI in the Civil Rights Restoration Act. The legislative history of the Restoration Act makes quite clear that Congress was actually aware of *Guardians* and understood that case as upholding agency discriminatory-effect regulations.[32] The Department of

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[32] See H.R. Rep. No. 829, 98th Cong., 2d Sess. Pt. 1, at 24 (1984). Senator Kennedy explained that "title VI regulations use an effect

Justice explained that the proposed Restoration Act would provide "expanded federal jurisdiction" over claims arising "under Federal regulations which forbid conduct [that] falls with a disproportionate impact on particular groups," 134 Cong. Rec. 4237-4238 (1988) (quoting Department letter), leading one Representative to claim that President Reagan's veto (subsequently overridden by Congress) was based on a preference "to rely on 'intent' rather than 'effect' in identifying discrimination so that in the absence of 'discriminatory purpose,' effective discrimination is allowed," *id.* at 4779 (Rep. Richardson). Aware of the discriminatory-effect regulations and the Court's validation of them in *Guardians*, Congress nonetheless expanded the statute's scope.

The text of the Restoration Act also clearly demonstrates Congress's understanding that it was ratifying the existing regulatory scheme. The Restoration Act's preamble states that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of [Title VI, Title IX and Section 504] as previously administered." Pub. L. No. 100-259, § 2, 102 Stat. 28. In debates surrounding an existing Title IX regulation involving abortion, Members of Congress explained that this preambulatory language would ratify all existing regulations. Senator Danforth stated that the language of the preamble "quite expressly" affirms existing

standard to determine violations" and that "the Federal courts have upheld the use of an effect standard." 134 Cong. Rec. 229 (1988); see also 130 Cong. Rec. 27,935 (1984) (Sen. Kennedy). Senator Hatch explained that the legislation provided "expansive coverage" of "agency disparate impact regulations implementing Title VI." 134 Cong. Rec. 4257 (1988); accord *id.* at 4231, 4239, 4252, 4259 (Sen. Hatch). A member of the House observed that the legislation would bring about an "extension of the effects test." *Id.* at 4784 (Rep. Boulter); see also *id.* at 4767 (Rep. McEwen); *id.* at 4246 (Sen. Symms).

regulations, and that "the bill without the Danforth amendment expressly reaffirms a regulation" relating to abortion.[33] That was also the view of the Executive Branch.[34] To address those concerns, Congress enacted the Danforth Amendment, 20 U.S.C. 1688, providing that Title IX does not require recipients of federal funds to pay for any benefits or services relating to abortion. Thus Congress demonstrated its understanding that it was ratifying all existing regulations that it did not expressly disavow. But *no* proposal was made to limit the discriminatory-effect regulations, despite Congress's awareness of their existence during Congress's deliberations that resulted in expansion of the coverage of Title VI. The Restoration Act therefore ratified the discriminatory-effect regulations upheld in *Guardians*.

[33] 134 Cong. Rec. 347 (1988); see also *id.* at 350 ("we are, by statute, reaffirming a regulation"); *id.* at 352 ("The bill in its present form expressly ratifies those regulations."); *id.* at 342 (Sen. Durenberger) ("we are voting to reaffirm the regulations"); *id.* at 345 (Sen. Hatch) (enacting bill "effectively codifies" regulations).

[34] See *1987 Senate Labor Comm. Hearings*, *supra*, at 442 (Mark Disler, Deputy Assistant Attorney General, Civil Rights Division); see also *id.* at 135, 231, 519.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

JAMES ALEXANDER, *in his official capacity as the Director of the Alabama Department of Public Safety*, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,
Petitioners,

v.

MARTHA SANDOVAL,
Individually and on Behalf of All Others Similarly Situated,
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

After two rounds of briefing, this much is clear. In enacting Title VI in 1964 under the Spending Clause, Congress did not expressly establish a disparate-impact standard of care and did not expressly create a private right of action. And while numerous federal agencies have established disparate-impact standards in implementing Title VI, not one of them has created a private cause of action to enforce this or any other standard. To prevail on this record, respondents thus must convince the Court to embrace two innovations that it has never directly considered—and accepted—before. The first is the contention that Congress may create private-party causes of action against States, as opposed to other entities, *see Cort v. Ash*, 422 U.S. 66 (1975), by implication rather than by explicit design. The second is the claim that federal agencies may do so themselves when the National Legislature has not.

The former theory cannot tenably co-exist with the clear-statement requirements of the Court's Spending-Clause jurisprudence and the principles that inform it. As this case comes to the Court, all that allows the Federal Government to dictate the number of foreign languages in which States must offer their driving-license examinations is a State's express consent to these extra-constitutional duties. Yet only a most fictional form of consent exists when federal courts may infer causes of actions, standards of care and other requirements to be named later that the Congress itself did not explicate.

The latter theory has no pedigree whatsoever. In case after case, the Court has gone to great lengths in explaining why the inter-branch comity between the National Government and the States requires *Congress* to be unambiguous in regulating core state functions and in permitting private parties to sue States in federal court. Here, however, it is not just Congress that has been silent about the creation of this disparate-impact private right of action. Not even the federal agencies themselves—all 40 of them, U.S. Br. 3—have

explicitly said that private parties may sue to enforce these regulations. Accordingly, even if Congress could delegate to federal agencies authority to create private rights of action against States, the agencies exercised no such authority here. On this ground alone, respondents' claim should fail.

Nor, even on their own terms, do respondents' efforts to extend *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Cort v. Ash* to private rights of action against States succeed in this setting. It was one thing in *Cannon* to say that Congress could imply an intentional-discrimination right of action in spite of the extensive oversight requirements that Congress imposed on the agencies' implementation of Title IX. It is quite another to allow these same agencies to innovate the very theory of care that this private right of action enforces. And not even the most muscular interpretation of *Cort v. Ash*—which starts with "the statute" and ends with whether the cause of action is in an area "traditionally relegated to state law," 422 U.S. at 78—can create an implied private right out of Title VI to establish the number of foreign languages in which States must offer driving-license examinations.

1. Of all the principles auditioning to govern this case, the most compelling start with the source of authority by which the Federal Government claims supervisory power over these state licensing examinations. Neither set of respondents claims plenary authority to oversee this everyday exercise of the local police power, whether under Section 5 of the Fourteenth Amendment or under the Commerce Clause. All instead concede that this exercise of authority rises or falls under Congress's indirect power to impose extra-constitutional obligations on the States through the spending power.

Resolution of this case, then, starts not with the traditional Supremacy Clause assumption that the Federal Government has direct authority over this area, but with the assumption that the States remain free to consent to this extra-constitutional assertion of power on their own terms. Like all waivers of

constitutional guarantees, as we have shown (Pet. 21-23), such claims of consent must be narrowly construed. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("courts indulge every reasonable presumption against waiver of fundamental constitutional rights") (quotation omitted); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights"). When Congress thus "desires to condition" funding (*South Dakota v. Dole*, 483 U.S. 203, 207 (1987)) on the States' consent to federal authority to regulate beyond Article I's "enumerated legislative fields," *id.* at 207 (quotation omitted), and beyond the "Tenth Amendment limitation on congressional regulation of state affairs," *id.* at 210, "it 'must do so unambiguously.'" *Id.* at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). That requirement, case law makes clear, applies whether Congress attempts to regulate core local police powers, as in *South Dakota v. Dole* (setting national minimum-age requirements for drinking), whether it attempts to make the States amenable to suit, as in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (trying to expose States to suits under the Rehabilitation Act), or whether it tries to do both—as here by trying to supervise state driving-license examinations *and* by exposing non-consenting States to private-party enforcement actions.

Respondents do not challenge these core premises. They do not contest that only the Spending Clause may sustain this federal supervision of these traditional state activities. They do not contest the existence of a clear-statement requirement accompanying this source of authority. And they do not contest that Congress failed in 1964 unambiguously to create this cause of action in Title VI.

Instead, they argue (Resp't 41) that this duty of clarity extends only to "a state's substantive obligations," not to "the

existence of a cause of action." *See* U.S. 32-34; Resp't 37-41. But the Court's Spending-Clause cases say no such thing. They require Congress to state all conditions upon which States receive federal funds "unambiguously" so that the States are "'knowingly[] cognizant of the consequences of their participation.'" *South Dakota*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17). One such consequence to be sure is the standard of care that States must follow. But the other consequence, no less essential in scope, is how that standard may be enforced.

From the time of Blackstone forward, legal obligations from common law property to tort have gone hand in hand with the circumstances under which they may be enforced. And, indeed, most of the Court's clear-statement cases in the federalism arena deal not with the duty of care but with how and where that duty may be enforced. Consider *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). Both considered whether States could be sued in federal court, not whether States ultimately had a legal obligation to comply with 42 U.S.C. § 1983 in the one case or the Rehabilitation Act in the other. *See also National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995); *Employees of Dep't. of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973). The same is true regarding the States' amenability to suit by the Federal Government but not by private individuals; the issue there is not one of duty but of who may bring the claim. *United States v. Texas*, 143 U.S. 621 (1892). In the end, not just the obligations themselves, but the effects of allegedly violating them, are the types of "consequences" that the Court requires Congress to make the States "knowingly[] cognizant" before it will assume that they have consented to them. *South Dakota*, 483 U.S. at 207. *See United States v. Heth*, 7 U.S. (3 Cranch) 399, 409 (1806) (Johnson, J.) (resolving ambiguity "most strongly '*contra proferentem*'"); *id.* at 413 (Paterson, J.)

("the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law makers").

Absent an unambiguous description of the standard of care, together with an express description of the parties who may sue and be sued, it thus is impossible to say that the States have consented to this exercise of federal power and impossible to say that the imposition of extra-constitutional duties is permissible. The very "legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms" of the funding. *Pennhurst*, 451 U.S. at 17. No such acceptance occurred here.

2. Nor may Congress circumvent this rigorous requirement by claiming (U.S. 32) that Alabama was "on notice" that its receipt of federal funds came with legal obligations—including the obligation to follow the Title VI regulations—and that this notice alone suffices to satisfy the *Pennhurst* clear-statement requirement. Yet again, notice of legal obligations is one thing; notice of the manner in which they may be enforced—whether by federal agencies or private parties—is quite another.

Two Terms ago, the Federal Government promoted a similar theory of notice in trying to make an equivalent argument of consent against the States. At issue in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), was the federal Lanham Act, and as here the question was not whether the States had a duty to comply with the Act's standard of care, but rather whether that duty could be enforced through private rights of action in federal court. In arguing that the States had "impliedly" or "constructively" consented to such suits in federal court, *id.* at 676, the Federal Government argued that the States did so by entering into commercial areas of interstate activity covered by the Lanham Act after being on notice of the

Act's substantive and enforcement terms. Not so, the Court held:

> There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that the State made an altogether voluntary decision to waive its immunity.

527 U.S. at 680-81 (quotation omitted). If a State does not waive its immunity from suit by violating the Lanham Act after being on "notice" of its terms, surely it does not consent to suit by accepting federal funding after being on "notice" of the of the Title VI regulations. The Court's rejection of the one theory of constructive consent necessarily defeats the other.

Nor are respondents' case citations to the contrary. Not one of them involves claims against States or state officials brought in the name of enforcing Spending-Clause legislation. One is a claim against a county, *see Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60 (1992); another is a claim against the Federal Government in which relief was denied, *see Lane v. Pena*, 518 U.S. 187 (1996); and the last is a statutory claim against a State arising from an exercise of Congress's enforcement power under the Fifteenth Amendment, *see Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). These cases provide a slim reed upon which to rest the broad assertion (U.S. 33) that "the Court has long accepted that a private right of action may be implied against" States.

3. The private respondents next argue (Resp't 39-40) that the State's position "demonstrably proves too much," because if it were accepted, "*any* implied cause of action would

be impermissible." But this argument does not maintain that *all* implied causes of action should be barred, just those against States. And that is as the Court's cases indicate it should be. How else does one fairly ensure that the extra-constitutional requirements that the Spending Clause allows Congress to impose on States properly stem from actual, as opposed to constructive, consent? The *sotto voce* implications and inferences that *Cort v. Ash* requires in the end have no place in the context of private rights of action against States arising under Spending-Clause legislation.

Far from causing a sea change in the law (*see* Resp't 8), this is a view that the Congress has long appreciated and long accepted. Not only do recent laws expressly create causes of action against States when that is what the National Legislature meant, *see, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, but since 1964 Congress has appreciated this very point in the context of Title VI and related statutes. One of the private respondents' principal arguments confirms this development. In claiming (Resp't 32-33) that the Rehabilitation Act Amendments of 1986 expressly make States amenable to suit by private individuals for violations of Title VI, Title IX, and Section 504 of the Rehabilitation Act, *see* 42 U.S.C. § 2000d-7, *Franklin v. Gwinnett County Public Schs.*, 503 U.S. at 72, respondents ultimately prove our point—that Congress, like the Court, appreciates that States are not traditional civil defendants and before they may be made amenable to suit in the Spending-Clause context, the obligation and private right of action must be expressly identified. Notably, however, the 1986 Rehabilitation Act Amendments say nothing at all about private rights of action to enforce agency regulations. They specifically refer only to "suit[s]" under "Federal statute[s]," and "suit[s] against a State for a violation of a statute." 42 U.S.C. § 2000d-7(a)(1)&(2). Both sets of respondents conspicuously fail to respond to, much less rebut, this component (Pet. 46) of our opening brief.

4. All of this leads to the real consequence of accepting respondents' arguments—not a preservation of the implied right of action doctrine but its novel extension to agency regulations. Not one of the applicable disparate-impact regulations, as we pointed out in our opening brief (Pet. 33), expressly creates a cause of action against States or for that matter against anyone else. This deficiency not only undermines the contention that the State consented to this cause of action by accepting federal funds, but more fundamentally confirms the ambition of respondents' position—a desire to extend *Cannon v. University of Chicago* to claims against States and to private rights of action implied not by Congress but by federal agencies. This sudden development has no support in precedent, and would positively undermine the constitutional justification that makes Congress's extensive legislation under the spending power otherwise "legitima[te]." *Pennhurst*, 451 U.S. at 17.

Attempting to justify this extension of precedent, the Federal Government starts by arguing (U.S. 14) that the question should not be analyzed under the "somewhat restrictive" implied-right-of-action test followed "today" but should be gauged by the standards of statutory construction embraced in 1964. It then argues (*id.* at 15) that in 1964, "courts had consistently recognized implied private rights of action to enforce not only statutory prohibitions, but also regulatory provisions."

This invitation to step back in time deserves short shrift. For one, this is not a neutral principle but a one-sided one. In making this argument, the government shows no inclination to set the clock back on other congressional expectations—for example, the number of foreign languages in which licensing examinations ought to have been given, or were given, in 1964. Recall that the 1964 legislative history says utterly nothing about the multi-lingual policy that the government now wishes to convert into a cause of action in 2001. For another, it is

unclear why 1964 rather than say 1986 or 1987 ought to be the appropriate benchmark, since Congress also amended Title VI (as respondents elsewhere argue) in these later years. For still another, the *Pennhurst/South Dakota* rule of construction has constitutional underpinnings—both in its legitimization of Congress's exercise of the spending power and in its presumption that Congress will not lightly regulate core state functions. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991). Time does not alter the Constitution's presumptions against altering the Federal-State balance.

More fundamentally, respondents err in suggesting that Congress showed more willingness in 1964 to expose States to implied private rights of action under administrative regulations than it has today. The one case against a State that the Federal Government cites, *see Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), involved a right of action under a statute, not a regulation. And the government's other efforts to bolster this point turn on securities law actions against private parties. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). But this action, quite simply, is not a securities case. It involves state defendants, not private defendants; it involves the spending power, not the power to regulate interstate commerce; and it involves an administrative scheme in section 602 that implies the non-existence of such private rights of actions rather than their existence.

Even on their own terms, moreover, these securities cases do not allow the kind of freestanding private rights of action that respondents suggest. Just six years ago, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Court confirmed the point in examining a claim under the most-frequently invoked rule issued by the Securities Exchange Commission—Rule 10b-5. Far from blessing rights of action developed by agencies rather than by

Congress, the Court unequivocally reasoned that in considering "the scope of conduct prohibited by section 10(b), the text of the statute controls our decision." *Id.* at 173. "Of course," the Court observed, "a private plaintiff now may bring suit against violators of section 10(b). But the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of section 10(b). . . . We have refused to allow 10b-5 challenges to conduct not prohibited by the text of the statute." *Id. See id.* at 177 ("It is inconsistent with settled methodology in section 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text."). Not only did the Court decline to look at the state of statutory construction in 1934 (when section 10(b) was enacted), *compare id.* at 195 (Stevens, J., dissenting), and not only did it refuse to rely on the SEC's view that such a cause of action should be allowed, *compare id.* at 199, but it also prohibited exactly the type of cause of action sought here—a "challenge[] to conduct not prohibited by the text of the law" under the guise of an agency regulation. Though Alabama relied on *Central Bank* and the above language in its opening brief (Pet. 27), neither of the respondents even acknowledges the contention. To the extent federal securities law offers any instruction regarding the resolution of this case, *Central Bank* supplies far more insight than any other case.

5. Still more unavailing are respondents' efforts to establish that the Court has already recognized such rights of action under its Spending-Clause precedents. The Court, to start with, has not done so under Title IX. *Cannon* was a discriminatory-intent case, and neither holds nor suggests that it would permit private rights of action under administrative regulations. That the private respondents feel obliged to make the unremarkable observation (Resp't 12) that "nothing in" the "phrasing" of the decision indicates that it was "limited to violations of" the statute, as opposed to the regulations, only confirms the point. Instead of ushering in a different view, *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459

(1999), involved "a private action under Title IX," *id.* at 462, in which the Court ultimately ensured that the Title IX regulations were read in a way that "accords with the teaching" of two decisions of the Court construing the relevant *statutory* language, *id.* at 468. That is all Alabama asks here.

The section 504 cases follow a similar path. *Alexander v. Choate*, 469 U.S. 287 (1985), *rejected* the private right of action sought there and ultimately concluded that "the regulations do not in fact support respondents' action." *Id.* at 294 n.10. More, *Alexander* recognized what respondents have not—that section 504 of the Rehabilitation Act, unlike Title VI, did reach "action that discriminated by effect as well as by design," and thus "resisted" "too facile an assimilation of Title VI law to Section 504." *Id.* at 293 n.7, 297. Likewise, *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987), did not involve a State and found (*id.* at 286 n.15) that "both" the statute and regulations supported its interpretation that the statutory term "handicapped" covered persons with a contagious disease. That is a far cry from this case, where the statute bars only intentional discrimination and claimants seek authority to infer a cause of action based on disparate effects. Of course, in none of these cases did anyone object to the creation of an implied private right of action to enforce an agency regulation.

6. That leads to the Title VI precedent, which is far less developed in recognizing implied rights of action than either the Title IX or Section 504 case law. Respondents do not, and cannot, plausibly rebut two reasons why *Lau v. Nichols*, 414 U.S. 563 (1974), fails to advance their claim. The first is that *Lau* "rel[ied] solely on section 601" in invalidating a school program that simultaneously compelled Chinese-speaking students to attend public school and refused to supply all of them with "special English instruction." *Id.* at 564 n.1 & 566. The second is that section 601 bars only what the Fourteenth Amendment bars, which is intentional discrimination. *See*

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *Washington v. Davis*, 426 U.S. 229 (1976). Under these circumstances, one of two things is true about *Lau*: Either the decision is no longer good law because it mistakenly concluded that section 601 covers disparate "effect[s]," 414 U.S. at 568, or it implicitly turned on a finding of intentional discrimination. Either way, the decision does not help respondents. And given *Lau*'s failure explicitly to consider the scope of section 601, any references to section 602 and the regulations in the decision—all in a case in which no one asked whether an implied right of action could exist and whether an agency rule could create such a right of action when section 601 did not—are equally unhelpful.

Like *Lau*, *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983), raises far more questions than it answers. It, too, was not a claim against a State and for that reason alone *Guardians* and *Lau* do not support this claim. Above all, however, *Guardians rejected* the private right of action that plaintiffs brought. Any effort to read into the six opinions a controlling theory for *recognizing* a private right of action therefore is necessarily wishful. The same is true of *Bazemore v. Friday*, 478 U.S. 385 (1986), which did not remotely address whether an implied right of action existed to enforce Title VI regulations and which at all events *rejected* the plaintiffs' claim.

Surely, moreover, the kind of casual opinion reading that would conclude *Guardians* and *Bazemore* (or for that matter *dicta* from any non-Title VI case) established a private right of action to enforce disparate-effects regulations is one that would also have to conclude that this principle was no longer good law by 1992. That year, in *United States v. Fordice*, 505 U.S. 717(1992), the Court addressed a claim against a State, not a city, and the 8-1 decision unequivocally stated that "[o]ur cases make clear . . . that the reach of Title VI's protection extends no further than the Fourteenth Amendment." *Id.* at 732 n.7.

For this reason, the Court rejected claimants' reliance on an "affirmative action" regulation that purported to require more than the Fourteenth Amendment requires. *Fordice*'s broad statement about the reach of "Title VI," which repeats equally broad statements about Title VI in *Bakke*, was anything but casual. It would have dramatically changed the dynamics, if not the outcome, of both *Fordice* and *Bakke* to permit private parties to bring disparate-effect claims under the Title VI regulations.

Whatever principles of opinion reading would allow respondents to argue for victory under *Guardians* and *Bazemore* necessarily augur defeat under *Fordice* and *Bakke*. In the end, the public and private respondents do not further their defense of the Eleventh Circuit's decision by attacking one of its central conclusions (Pet. App. at 42a)—that this "Court has yet to squarely answer the question" whether "Title VI creates a private implied cause of action" against States "to enforce the disparate impact regulations promulgated under Section 602." On that point, the lower court was correct, and that is precisely why the question presented must be assessed based on the Court's traditional Spending-Clause principles and its traditional reluctance to presume that Congress would regulate core state functions and expose non-consenting states to private rights of action without expressly saying so.

7. Nor, for these same reasons, can respondents plausibly argue (Resp't 32-37, U.S. 41-47) that Congress "ratified" the existence of an implied right of action under the disparate-impact regulations. To the extent anything has been ratified, it is that private rights of action exist under the statute, not under the regulations, and that Congress knows the difference. *See* The Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7. That is why respondents carefully say (Resp't 33) that the Rehabilitation Act Amendments of 1986 and the Civil Rights Restoration Act of 1987 "presumptively encompass[]" rights of action based on the regulations, as

opposed to the statute. Yet, in the absence of a pre-existing holding accepting the point, as opposed to one rejecting it, *see Guardians*, it is sheer fiction to claim victory from either enactment. The former was a response to *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), which held that Congress did not explicitly abrogate the States' Eleventh Amendment immunity through a *statute*, and the latter was a response to *Grove City College v. Bell*, 465 U.S. 555 (1984), which limited the types of "program or activity" under the *statute* that must comply with Title VI and related statutes when an entity receives federal funds. It is equally contrived to claim that Congress ratified lower-court decisions in 1986 and 1987 as the lower courts were not of one mind on the point. *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) (finding an open question whether a private right of action exists under the Title VI disparate-impact regulations).

These elaborate fictions turn to farce when respondents proceed to seek ratification (Resp't 34; U.S. 46) through the individual statements of legislators, not even collective committee reports, over the last 36 years. Even a brief attempt at this exercise confirms that there are as many unfriendly faces as friendly ones regarding the point respondents are trying to make. *See, e.g.*, 110 Cong. Rec. 2467 (1964) (Rep. Gill); *id.* at 6562 (Sen. Kuchel); *id.* at 7065 (Sen. Keating); *see generally Bakke*, 438 U.S. at 381, 385-86 (White, J., concurring in part and dissenting in part). The view that these two Acts and their legislative history "ratified" rights of action under disparate-impact regulations ultimately requires far more implications and inferences than even *Cort v. Ash* does.

8. Separate and apart from the fact that claimants brought this action against a State, as opposed to a private party or municipal corporation, their effort to infer a right of action based on agency regulations founders on the terms of Title VI itself. As we showed in our opening brief (Pet. 24-30), Congress in section 602 of the Act established elaborate

procedural restrictions regarding when and how federal agencies could enforce the anti-discrimination mandate of section 601. These restrictions include the explicit proviso "[t]hat no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. And the "no such action" mandate applies by its terms both to "termination[s]" of funding and to "any other means authorized by law" to obtain compliance with section 601. *Id.*

In this instance, all agree that neither the federal Department of Transportation nor the Department of Justice "advised" Alabama that it had failed to comply with Title VI and did not seek to obtain "compliance" through "voluntary means." Nor have the departments given the district court (U.S. 32) "the benefit of agency expertise." At no point did either agency explain to the federal district court for example why Alabama's licensing requirements violate Title VI while the National Government's extensive English-proficiency requirements do not. To date, the record still awaits an explanation why a tenth grade level of English proficiency is invalid in Alabama for driving licenses but an "elementary" level of English proficiency is valid in the entire United States for naturalization purposes. *See* 8 U.S.C. § 1423(a)(1); 8 C.F.R. § 312.1(c)(2). *See also* 8 U.S.C. § 1423(a)(2) (requiring "a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States"). The modest difference between the two standards hardly explains why one amounts to discrimination on the basis of national origin and the other does not. Still less does it do so when one considers that the Alabama requirement is at least a generally-applicable one while the Federal requirement applies *only* to individuals on the basis of their national origin.

To all of this, claimants respond that the section 602 notice and voluntary compliance requirements apply just to terminations of funding, not to other enforcement actions. But the "no such action" language of section 602, to repeat, applies to "termination[s]" of funding *and* to "any other means authorized by law" to obtain compliance with section 601. *Id.* The language of the statute cannot sustain this distinction.

Nor does *Cannon* support a contrary interpretation. *Cannon*, it is true, found an implied right of action under Title IX, which in many respects parallels section 601 and section 602 of Title VI. But the decision inferred a private right of action directly under the equivalent of section 601, not under the equivalent of section 602. That is to say, it was a claim arising directly from the intentional-discrimination mandate of the statute itself. That cause of action, however, is a far cry from an implied right of action arising from regulations promulgated by the very agency that Congress instructed could not enforce the Act save when it complied with Congress's notice and voluntary compliance prerequisites. It would be surpassingly strange to place these extensive enforcement restrictions on a federal agency, then allow that same agency to avoid every one of them by creating a new right of action not established by section 601. A Congress concerned with the former would not lightly allow the latter.

Because *Cannon* concerned a right of action implied directly under the statutory anti-discrimination standard, as opposed to an administrative one, it offers no support for a contrary rule. Indeed, one might fairly ask whether the sharply-divided decision in *Cannon* would have come out the same way had the majority been forced to shoulder not just the burden of justifying an implied right of action under the statute's intentional-discrimination mandate but under an agency-created disparate-impact standard as well. To sustain that conclusion, the Court would have been forced to embrace an interpretation recognizing the role of a "private attorney

general" (*Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam)) and suddenly a "private legislator" too.

9. The Federal Government offers no response to the contention (Pet. 37-40) that these regulations do not satisfy even the bare minimums for implying a right of action under *Cort v. Ash*. Indeed, they only mention the case (U.S. 14) to say that the Court should not follow "the somewhat restrictive test set forth in *Cort v. Ash*." The private respondents, for their part, offer (Resp't 31-32) only a brief rejoinder to the point. And neither set of respondents offers *any* response to Alabama's reliance (Pet. 35-37) on *Suter v. Artist M.*, 503 U.S. 347 (1992), and its indication that even *Cort v. Ash* requires the "unambiguous[]" (503 U.S. at 356, 363-64) (quotation omitted) creation of a cognizable right before it may be enforced against State defendants. *Suter* is nowhere mentioned in either brief.

No satisfactory answer, we respectfully submit, exists to these points. First, Title VI offers little support for the view that it "create[d] a federal right in favor" of those who are not yet proficient in English, and even less does it do so unambiguously. *Cort*, 422 U.S. at 78. It has never been the case, whether in 1964 or today, that generally-applicable English-proficiency requirements unconstitutionally discriminate on the basis of national origin. It therefore is difficult to say that Title VI, whose substantive anti-discrimination provision parallels the Constitution, clearly created a right in favor of respondents. Second, in light of the extensive administrative enforcement scheme, every "indication of legislative intent" diminishes the claim that these same agencies may imply a right of action that Congress has not. *Id.* Third, it is not "consistent with the underlying purposes of the legislative scheme" to infer such a remedy -- if for no other reason than nothing in the legislative record suggests either that the prohibition of such English-proficiency requirements was intended or that lawsuits regarding such requirements were

to be encouraged. *Id.* Such a legislative design also makes scant sense in light of the extensive English-proficiency requirements that the United States and all 50 States have, and which are presumably a private lawsuit away from threatened invalidity if respondents' position is sustained. *See* Pet. Appendix. Fourth, English-proficiency requirements and driving-license requirements are precisely the kinds of matters that have been "traditionally relegated to state law" rather than to "cause[s] of action based solely on federal law." *Id.*

In response, claimants tepidly argue (Resp't 31-32) that the regulations and agency intent (as opposed to the statutes and congressional intent) satisfy each of these inquiries. The only citation offered (*id.*) to support this elision of legislative and administrative design is *Cannon*, but as noted it identified an implied right of action under a statute, not a regulation. Even then, the agency regulations do little to explain how the disparate-effects test applies to English-language requirements —except to say that States should take "reasonable steps" to address the needs of non-English-speaking residents. 28 C.F.R. § 42.405(d)(1). It was precisely the inscrutability of a similar "reasonable efforts" requirement in *Suter* that precluded the creation of an implied right of action in that case either under the *Cort v. Ash* test or under 42 U.S.C. § 1983. *See* 503 U.S. at 360 (provision unenforceable given "[n]o further statutory guidance . . . as to how 'reasonable efforts' are to be measured").

Each of these legal explanations for declining enforcement of this regulation through a private right of action points to a more practical reason. It may in some settings be appropriate to allow federal agencies to promulgate vague regulations that they themselves enforce. Then at least courts may probe what the regulation means, how it is applied in other settings and what its limits are -- all in a setting where judges may obtain answers from the very agency that authored the regulation and obtain assurances that the agency will apply the rule

consistently. It is a far different matter, however, to allow federal agencies to promulgate vague regulations, then unleash them on unwitting plaintiffs, States and courts to ascertain concrete principles from such ineffable concepts as a disparate-impact test that just requires a "reasonable steps" remedy. Federal officials receive acclaim for banning such disparate effects yet face no accountability for explaining what the regulation means -- a development that even the most public-spirited federal (or state) official would find hard to resist and could hardly be expected to stop on his or her own.

The facts of this case illustrate the point. One might have thought that it was "reasonable" in the first instance to require all residents of Alabama to obtain a tenth-grade proficiency in English not just for driving-license purposes but for all manner of good-government reasons. That requirement assuredly would not violate the Constitution -- particularly in light of the many public and private resources the State offers for all residents (native born or not) to learn the language. Likewise, it is difficult to apprehend why the decision of Alabama residents to be as particular about their common language as say the French violates anything in Title VI. Yet the prosecution of this implied right of action compelled the State to a class action trial over the reasonableness of these policy decisions and cross-examination over the number of languages in which its driving-license tests ought to be offered. Worse, respondents now seek (Resp't 4 & n.4) to gain leverage on appeal from one district court's "factual determinations" regarding the evidence in the case, including its "finding" that this disparate impact was "unjustified" and that the State's safety justifications were insufficient. Throughout this trial, no federal agency or for that matter any member of Congress offered their views on what was "reasonable" in this area. This hardly gives a "government of laws" a good name.

10. Respondents' extensive defense of the validity of the regulations is neither relevant nor persuasive. It is irrelevant

because whether the regulations are valid or not, no basis exists for implying a private right of action under them. The Court has not traditionally recognized implied rights of actions under regulations before, and it has never done so against States. As we indicated in our opening brief (Pet. 45), the regulations may indeed be validly enforced by the agency that promulgated them -- an approach that respects the enforcement restrictions of section 602 and still gives the agency ample discretion to implement Title VI. Nor, as the government mistakenly claims (U.S. 31), does our position necessarily preclude private rights of action for retaliation claims. A retaliatory motive after all will frequently demonstrate discriminatory intent.

The defense of the regulations is unpersuasive because, as shown (Pet. 30-33), one does not "effectuate" a statute by dramatically altering its meaning. In enacting a law that reaches only intentional discrimination, Congress did not give federal agencies a warrant to promulgate vague "disparate effects" rules through its delegation of rulemaking power to "effectuate" section 601. *See Guardians*, 463 U.S. at 613 (O'Connor, J., concurring in the judgment) ("Such regulations do not simply 'further' the purpose of Title VI; they go well beyond that purpose."); *id.* at 611 n.5 (Powell, J., concurring in the judgment) ("Administrative agencies do not have -- and should not have -- such lawmaking power"). That is not to say, however, that the regulations ought to be invalidated in this case. The issue need not be addressed. Rather, the dubious validity of the regulations simply makes implying this right of action all the more exceptional and all the more unwarranted.

CONCLUSION

The lower-court decision should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

NOV 9 2000

JAMES ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ALABAMA DEPT. OF PUBLIC SAFETY

AND

ALABAMA DEPT. OF PUBLIC SAFETY,

Petitioners

v.

MARTHA SANDOVAL,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PRO-ENGLISH, ENGLISH FIRST FOUNDATION, CENTER FOR AMERICAN UNITY, AND UNITED STATES REPRESENTATIVES TOM TANCREDO, SPENCER BACHUS, BOB BARR, JOHN DOOLITTLE, BOB GOODLATTE, ERNEST ISTOOK, JOE KNOLLENBERG, WILLIAM LIPINSKI, CHARLIE NORWOOD, RON PAUL, BOB RILEY, DANA ROHRABACHER, NICK SMITH AND BOB STUMP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether Congress intended to create a private cause of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

Note: *Amici* respectfully suggest that the Question presented above fairly includes the following questions:

Whether a person's choice of language can be equated, under Title VI of the Civil Rights Act of 1964, to the person's national origin.

Whether Title VI of the Civil Rights Act of 1964 requires a state agency, which receives federal funds for some of its programs, to provide all services in any language demanded by applicants.

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INTEREST OF AMICI CURIAE

There are several amici curiae participating in this brief.[1] Counsel for all parties have consented to the filing of this brief.

Pro-English (formerly known as English Language Advocates) is a non-profit advocacy organization dedicated to the preservation and promotion of a common language – English – in American political and governmental life. Pro-English is an unincorporated project of U.S., Inc., of Petoskey, Michigan, a non-profit charitable and educational corporation. Pro-English and its President, Robert D. Park, have been the principal advocates for "official English" policies before the federal courts, including in *Arizonans for Official English and Robert D. Park v. Arizona*, Nos. 95-974 and 98-167.

English First Foundation ("EFF") is a national, non-profit charitable organization which studies the significance of the use of English in the United States and educates the public about the importance of preserving English as the common language of the United States. EFF conducts research, educational programs, seminars and conferences, and provides legal counseling and assistance. EFF was an *amicus curiae* in Nos. 98-404 and 98-564, *U.S. Dept. of Commerce v. U.S. House of Representatives*, and *Clinton v. Glavin*.

The Center for American Unity ("CAU") is a national non-profit charitable and educational organization dedicated to preserving our historical unity as Americans into the 21st Century. CAU's education program emphasizes that America's common language, English, is the basic bond uniting and strengthening the United States.

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[1]Pursuant to Rule 37.6, *amici* certify that no other person or entity made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

Cong. Tom Tancredo, a United States Representative from the Sixth District of Colorado, sits on the Subcommittee on Oversight and Investigations of the House Committee on Education and Labor, which has jurisdiction over the Equal Employment Opportunity Commission, discussed at length herein. Cong. Tancredo sent and received the letters reprinted in the Appendix to this brief.

Cong. Spencer Bachus, Bob Barr, John Doolittle, Bob Goodlatte, Ernest Istook, Joe Knollenberg, William Lipinski, Charlie Norwood, Ron Paul, Bob Riley, Dana Rohrabacher, Nick Smith, and Bob Stump are United States Representatives from Alabama, Georgia, California, Virginia, Oklahoma, Michigan, Illinois, Georgia, Texas, Alabama, California, Michigan, and Arizona, respectively.

At its heart, this case is about whether a person's choice of language can be equated to the person's national origin. *Amici* are deeply concerned about the effect of equating language and national origin. *Amici* are involved in efforts to promote the use of English as the language of government, and *amici* believe that equating language and national origin will both stop governments from requiring the use of English and force governments to provide services in languages other than English. Such an equation of language and national origin could have a substantial impact on *amici*'s activities.

STATEMENT OF CONTEXT

This is the third time in the last ten years that this Court has reviewed cases involving government's choice of language for internal operations: *Hernandez v. New York*, 500 U.S. 352

(1991), No. 89-7645; *Arizonans for Official English v. Arizona*, 520 U.S. 34 (1997), No. 95-974; and this case.[2]

This Court last looked at language-related issues in *AOE v. Arizona*, No. 95-974. At that time, the briefs of the parties and *amici* described current political battles on the federal level, including Congressional considerations of legislation to declare English the official language of the United States, to reform bilingual ballots and to eliminate bilingual education. In the intervening years, there has been relatively little Congressional activity on language-related questions, but enormous changes

[2]This Court earlier vacated a case which offered an unacceptable "solution" to tensions in the workplace caused by the use of languages other than English. In *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1039 (9th Cir. 1988), *dissent from reh'g en banc*, 861 F.2d 1187 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989), Judge Reinhardt said, in part, that problems associated with African-American supervisors not understanding Spanish-speaking workers could be remedied by hiring bilingual supervisors. 838 F.2d at 1043. Judge Kozinski and two other judges called the proposal to fire African-American supervisors a "let them eat cake" attitude which would exacerbate racial tensions in the workplace. 861 F.2d 1187, 1194 (9th Cir. 1988)(Kozinski, J., dissenting from denial of reh'g *en banc*). Judge Kozinski's prediction may be on target. *See, e.g., Family Service Agency San Francisco v. Nat'l Labor Relations Board*, 163 F.3d 1369 (9th Cir. 1999)(discussing language tensions in a racially-diverse workplace).

Though this Court vacated *Gutierrez*, Judge Reinhardt considers the vacated opinion to still "represent the thinking" of the Ninth Circuit. *Garcia v. Spun Steak*, 13 F.3d 296, 301 (9th Cir. 1994)(Reinhardt, J., dissenting from denial of reh'g *en banc*). So do Respondents, Pet. App. 238a (District Court quoting plaintiffs), and the Equal Employment Opportunity Commission. Amici App. 19A, n. 5 ("the validity of the case's reasoning was not affected because it was vacated on the ground of mootness.").

have occurred elsewhere, especially in the area of bilingual education.

In 1998, for example, California voters overwhelmingly adopted Proposition 227, an initiative driven by parents of limited-English proficiency ("LEP") children who wanted their kids to learn English. Steinberg, "Increase in Test Scores Counters Dire Forecasts for Bilingual Ban," *The New York Times*, August 20, 2000, P. A1. The initiative, known as "English for the Children," eliminated most existing bilingual education programs, which taught children in their native languages ("native language instruction"). The English for the Children initiative substituted an intensive program of English language instruction, teaching the children English by teaching them in English. *Id.*

Two school years later, test scores indicate that teaching the children in English was a smashing success.[3] Test scores in most school districts jumped dramatically. *Id.*

> In second grade, for example, the average score in reading of a student classified as limited in English increased 9 percentage points over the last two years, to the 28th percentile from the 19th percentile in national rankings, according to the state. In mathematics, the increase in the average score for the same students was 14 points, to the 41st percentile from the 27th.

Id.

One of the principal backers of the prior method of "native language instruction" was Oceanside, Calif., Superintendent of Schools Ken Noonan, a founder of the

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[3]*See, also,* Pearce & Ryman, "English-only Receives Boost," *Arizona Republic*, Aug. 22, 2000, front page.

California Association of Bilingual Education. Noonan, "I Believed That Bilingual Education Was Best . . Until the Kids Proved Me Wrong," *The Washington Post*, September 3, 2000, B1. Noonan fought Proposal 227, but when the voters passed it, he led Oceanside School District into strict compliance with the new law's requirements. *Id.* The results: Oceanside's test scores improved by 19 percentage points since implementation of the new law. *Id.*

> "I thought it would hurt kids," Mr. Noonan said of the ballot initiative, which was called Proposition 227. "The exact reverse occurred, totally unexpected by me. The kids began to learn – not pick up but learn – formal English, oral and written, far more quickly than I ever thought they would."

Steinberg, *supra.*

And the increase can be attributed to the new English immersion form of education:

> Oceanside's performance was all the more striking when measured against the nearby district of Vista, where half the limited English speakers . . . continued in bilingual classes. In nearly every grade, the increases in Oceanside were at least double those in Vista, which is similar in size and economic background to Oceanside.

Id.

The success of California's elimination of bilingual education is spurring similar efforts in Arizona, Colorado, Massachusetts, New York and other states. *Id.* In Connecticut, a new law offers English instruction and parental choice opportunities similar to those in the California initiative. Pub. Act 99-121, "An Act Improving Bilingual Education,"

http://www.cga.state.ct.us/ps99/act/pa/1999pa-00211-r00sb-01083-pa.htm.

At the same time, however, federal agencies are mounting an aggressive attack on English-language policies and programs. After hearing about the Oceanside School District's success, the federal Department of Education challenged Oceanside's implementation of the new English-language instructional techniques. Diehl, "O'side district ripped over bilingual ed," *North County Times*, Oct. 3, 2000, front page, *reprinted at* http://www.onenation.org/0010/100300b.html (reporting on joint investigation between federal and state departments of education); Diehl, "Prop. 227 author criticizes investigation of O'side district," *North County Times*, October 4, 2000, *reprinted at* http://www.onenation.org/0010/100400c.html ("The district could not document that they follow their own policies and procedures").

Similarly, the Equal Employment Opportunity Commission is steadily increasing its attacks on employers who wish their employees to speak English on the job. The EEOC has promulgated a rule which presumes that an employer's rule requiring English in the workplace is national origin discrimination. 29 C.F.R. § 1606.7. The EEOC reports that in 1996, it reviewed 77 national-origin discrimination challenges to workplace language rules. U.S. Equal Employment Opportunity Commission, "Court Speaks: English Only Rule Unlawful," Press Release, Sept. 19, 2000, www.eeoc.gov/press/9-19-99.html. That number jumped to 253 in 1999, and 355 by September of this year. *Id.*

As shown in more detail below, virtually every federal court which has considered the issue has rejected the EEOC's interpretation. For example, the Ninth Circuit recently rejected the EEOC policy as *ultra vires*. *Garcia v. Spun Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228

(1994)(upholding English-language workplace rule to stop workers from hurling racial insults at co-workers).

Yet a recent exchange of letters with Amicus Cong. Tom Tancredo, *attached* as an Appendix ("Amici App."), indicates that the EEOC is continuing to enforce its policy, even in jurisdictions which have rejected its interpretation.

Two dozen charges were resolved between August 1998 and August 1999. Amici App. 22A - 24A. Some of the charges were filed in appellate circuits which had rejected the guidelines. Amici App. 23A. The EEOC explains: "EEOC offices in a jurisdiction that has issued a decision contrary to the guidelines continue to conduct the administrative process pursuant to the guidelines. . . . Of course the EEOC would not file a suit to enforce the guidelines if such suit has been precluded by governing circuit law." Amici App. 23A - 24A. .

Building on the decision below and on the EEOC's new enforcement effort, the Administration issued Executive Order No. 13,166 (Aug. 11, 2000).[4] Executive Order 13,166 makes the same equation of language and national origin that the lower court did in this case. Executive Order 13,166 requires federal agencies to "provide meaningful access . . . to ensure that the programs and activities they normally provide in English are accessible to LEP [Limited English Proficient] persons and **thus do not discriminate on the basis of national origin**." Supp. App. 11a, (emphasis added).

Executive Order 13,166 requires federal agency programs to be approved under and be subject to the Department of Justice's new Policy Guidance on assistance to

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[4]Executive Order 13,166 and the interlocked Department of Justice Policy Guidelines were submitted as a supplemental filing to the Petition and are reprinted in the appendix thereto. Appendix to Supplemental Filing ("Supp. App.").

LEP persons. Supp. App. 12a. The Justice Department's Policy Guidance similarly equates language and national origin, relying in part on the decision below. Supp. App. 19a, 21a. The Policy Guidance expands this equation to federal grantees. "Recipients who fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title VI and its implementing regulations." Supp. App. 23a. In addition, because of the use of Title VI definitions of national origin in Title VII and IX cases, this equation of language and national origin will be applied in private employment cases, and perhaps other areas as well.[5]

Under Executive Order 13,166 and the Justice Department Policy Guidance, it is not enough to be neutral about language. To avoid a charge of national origin discrimination, an agency, grantee or employer must affirmatively provide language assistance. Supp. App. 23a - 27a.

Though the extent of assistance is supposed to be determined by a variety of factors, at a minimum, the agency, grantee or employer must provide at least oral translation services if only one person requests it. Supp. App. 23a. The Policy Guidance requires, in most cases, at least the use of "one of the commercially available language lines to obtain immediate interpreter services." Supp. App. 24a. Though not stated, apparently the cost of such services, which can be as high as $4.50 per minute plus "set-up" fees,[6] is to be borne by the agency, grantee or employer subject to a potential charge of national origin discrimination.

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[5]The lower court recognized the adoption of Title VII case law in its Title VI jurisprudence. Pet. App. 56a, n. 27.

[6]At, for example, AT&T LanguageLine Services. www.languageline.com/products_personal.php3.

Thus, at the same time that States are actively using more effective means to bring persons who do not speak English into the educational and social mainstream, the Executive Branch is using the decision below to impair just those successful efforts. The Executive Branch, without any authorization by Congress or the courts, has equated language and national origin in a manner which will cause enormous amounts of litigation, and will stifle promising efforts to teach English to those who could benefit so much.

SUMMARY OF ARGUMENT

The crux of this dispute is the equation of a person's choice of language to the person's national origin. To have a private right of action, as asserted here, a claimant must come within one of the recognized Title VI classes; the class at issue in this case is "national origin." Here no particular language was singled out as a proxy for discrimination against a protected class, thus the question is whether a choice of using English (as opposed to choosing to use languages other than English) is national origin discrimination.

The answer must be no. Equating a person's language with the person's national origin has no basis in law or fact. There is no statutory language or legislative history in the civil rights laws which suggests such an equation.

Nor is there any judicial decision which finds such an equation in the civil rights laws. Though there have been some suggestions that language rules may be proxies for otherwise hidden national origin discrimination, the vast majority of decisions have rejected the equation of language and national origin without more.

There are some administrative interpretations which equate language choice to national origin. These interpretations,

however, do not bind this Court. In addition, courts have overwhelmingly rejected those interpretations.

The equation of language to national origin also has no basis in fact, and would be both over- and under-inclusive. Spanish, for example, is the official language of at least 13 countries, impairing a determination of a speaker's ancestry. Many Hispanic-Americans do not speak Spanish, and many non-Hispanic-Americans do.

In addition, equating language and national origin would be unworkable. This is not a case about English vs. Spanish, but about English vs. hundreds of languages. The courts have repeatedly recognized the tremendous burdens of translating hundreds of languages and refused to impose such burdens.

Finally, equating language and national origin would be unwise. Any recognition by the Court of such an equation would affect dozens of settled decisions, sparking an enormous number of new claims of discrimination in government, contracting, employment, housing and other areas.

Any such equation of language and national origin would affect "original power" core functions of States. Choice of language for internal functions has historically been left to the States. Federal intervention on language choice over a vast sweep of State programs will weaken the States' powers. The statutory or constitutional authority for any such intervention should be explicit. Absent a clear and explicit abrogation of those State powers, the States should be left to decide – through their own political processes – which language burdens to accept. There is no such clear and explicit abrogation of State power for the language choices in this case.

The decision below should be reversed.

ARGUMENT

I. A Per Se *Rule Equating Language With National Origin Has No Basis in Law or Fact, and Would Be Unworkable and Unwise.*

The decision below equates language and national origin. *Sandoval v. Hagan*, 197 F.3d 484, 508-09 (11th Cir. 1999); *see*, Pet. App. 22a-29a.[7] Such a novel *per se* equation of language choice and national origin has no basis in law or fact, and would be unworkable and unwise.

A. A *Per Se* Rule Equating Language and National Origin Has No Basis In Law or Fact.

1. A Per Se *Rule Equating Language and National Origin Has No Basis in Law.*

The language, history and interpretations of the Fourteenth Amendment and other federal laws do not support equating, *per se*, language and national origin.

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[7]The Eleventh Circuit's analysis on this question was suspect. *Compare*, Pet App. 52a, "While existent case law is **unclear** as to whether language may serve as a proxy for *intentional* national origin discrimination claims of either a constitutional or statutory nature, this question is tangential to disparate *impact* analysis." (boldface added, italics in original), with *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984):

> A classification is implicitly made, but it is on the basis of language, *i.e.*, English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class.

See also, Toure v. United States, 24 F.3d 444, 446 (2d Cir. 1994)(affirming "the broadly-stated and thoroughly sensible ruling in *Soberal-Perez*").

Statutory Language:

"[T]he reach of Title VI's protection extends no further than the Fourteenth Amendment." *United States v. Fordice*, 505 U.S. 717, 732 n. 7 (1992)(citations omitted). The Fourteenth Amendment does not include the phrase "national origin." Nevertheless, discrimination on the basis of ancestry violates the Equal Protection Clause of the Fourteenth Amendment. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 614 n. 5 (1987). "Distinctions between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

No federal statute defines "national origin." Title VI of the Civil Rights Act of 1964 added "national origin," without definition, to the list of protected classes. 42 U.S.C. § 2000d, Pub. L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

Legislative History:

Legislative history does not support a language-based definition of national origin. This Court has noted that the legislative history concerning the meaning of national origin, even under statutory law, is "quite meager." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). Nevertheless, "[t]he terms 'national origin' and 'ancestry' were considered synonymous." 414 U.S. at 89. During debate on the 1964 Civil Rights Act, Representative Roosevelt stated: "May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2,549 (1964).

This Court supports that assessment: "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her

ancestors came." *Espinoza*, 414 U.S. at 88; *see also, Pejic v. Hughes Helicopters*, 840 F.2d 667, 672-73 (9th Cir. 1988)(persons of Serbian national origin are members of a protected class under Title VII).

Administrative Interpretations:

As noted above, there are now three administrative interpretations which equate language and national origin. The oldest[8] is the EEOC's presumption against requiring the use of English on the job. 29 C.F.R. § 1606.7. The newest are the interlocked Executive Order 13,166 (August 11, 2000) (*reprinted* in Supp. App. 10a - 13a), and the Justice Department's Policy Guidance on National Origin Discrimination Against Persons With Limited English Proficiency (*reprinted* in Supp. App. 14a - 28a).

This Court has never reviewed those administrative interpretations, and they do not bind this Court. *Espinoza*, 414 U.S. at 94-95.

Numerous other courts have reviewed the EEOC Guidelines and have rejected them and their underlying equation of language and national origin. *See, e.g., Garcia v. Spun-Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. den.* 512 U.S. 1228 (1994)(EEOC Guidelines equating language and

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[8]The EEOC presented its proposed interpretive guidelines to the Fifth Circuit (prior to the creation of the 11th Circuit), but the Fifth Circuit rejected the interpretation in *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."). Cong. Tancredo's examination of the legal support for this interpretation and the EEOC's detailed response (which relies on Judge Reinhardt's vacated opinion in *Gutierrez v. Municipal Court of the Southeast Judicial Dist.*, discussed in fn 2 above) are attached as the Appendix to this brief.

national origin were *ultra vires*); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(upholding English-on-the-job rule for non-English-speaking truck drivers); *Garcia v. Rush-Presbyterian St. Luke's Medical Center*, 660 F.2d 1217, 1222 (7th Cir. 1981)(upholding hiring practices requiring English proficiency); *Long v. First Union Corp.*, 894 F.Supp. 933, 941 (E.D. Virginia, 1995 ("there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job."), *affirmed*, 86 F.3d 1151 (4th Cir. 1996).

Judicial Interpretations:

As the lower court recognized, 197 F.3d at 509 n. 26, this Court has never held that the language a person chooses to speak can be equated to the person's national origin.[9] Though this issue was briefed and discussed in *Hernandez v. New York*, 500 U.S. 352 (1991), the Court did not make a holding on this question. "Petitioner argues that Spanish-language ability bears a close relation to ethnicity, and that, as a result, it violates the Equal Protection Clause. . . We need not address that argument here." 500 U.S. at 360.

The Circuits, on the other hand, have rejected such an equation.[10] *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d at 41:

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[9]*Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), sometimes cited to equate language and national origin, involved intentional discrimination on the basis of ancestry rather than language, because the law there was designed "to affect [Chinese merchants] as distinguished from the rest of the community." 271 U.S. at 528.

[10]The circuit courts have found a Sixth Amendment right to an interpreter at criminal trials. *See, e.g., United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970). *But see, Abdullah v.*

(continued...)

> A classification is implicitly made, but it is on the basis of language, *i.e.*, English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class.

See, also, Toure v. United States, 24 F.3d at 446 (affirming *Soberal-Perez* and rejecting request for multilingual forfeiture notices). "A policy involving an English requirement, without more, does not establish discrimination based on race or national origin." *An v. General Am. Life Ins. Co.*, 872 F.2d 426 (9th Cir. 1989)(table).

A few cases indicate that if the language policy is a pretext for intentional discrimination, a language-related rule might violate national origin rules.[11] In addition, two recent lower court decisions have adopted the EEOC's interpretation equating language and national origin. *See, e.g., EEOC v. Synchro-Start Products*, 29 F.Supp.2d 911, 915 n. 10 (N.D. Illinois, 1999)(on advice of law clerk, Judge Shadur was "staking out a legal position that has not been espoused by any appellate court."); *EEOC v. Premier Operator Services*, 113

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[10](...continued)
Immigration and Naturalization Service, 184 F.3d 158, 165-66 (2d Cir. 1999)(distinguishing between "government-initiated proceedings seeking to affect adversely a person's status and hearings arising from the person's affirmative application for a benefit").

[11]For example, Judge Reinhardt wrote, in an opinion vacated by this Court, that "since language is a close and meaningful proxy for national origin, restrictions in the use of languages may mask discrimination against specific national origin groups, or more generally, conceal nativist sentiment." *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995), *vacated, sub nom., Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

F.Supp.2d 1066 (N.D. Texas, 2000)(Magistrate Judge Stickney, rejecting appellate cases against EEOC Guidelines and relying on *Synchro-Start Products* and Judge Reinhardt's dissent from denial of rehearing *en banc* in *Spun Steak*, found disparate treatment of Hispanic employees in the promulgation of an English-workplace rule).

But almost all cases, including all Circuit decisions, have rejected the equation of language and national origin. *See, e.g., Gloor*, 618 F.2d at 270 ("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."); *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999)(permitting deportation notices in English); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973)(permitting English benefit termination notices); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975)(civil service exam for carpenters can be in English); *Garcia v. Spun Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. den.*, 512 U.S. 1228 (1994) (rejecting EEOC guidelines); *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir.)(table), *cert. den.*, 508 U.S. 910 (1993)(rejecting employment discrimination claim); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987)(permitting radio station to choose language an announcer would use); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (upholding English-on-the-job rule for non-English-speaking truck drivers); *Garcia v. Rush-Presbyterian St. Luke's Medical Center*, 660 F.2d 1217 (7th Cir. 1981)(upholding hiring practices requiring English proficiency); *Long v. First Union Corp.*, 894 F.Supp. 933, 941 (E.D. Virginia, 1995)("there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job"), *affirmed*, 86 F.3d 1151 (4th Cir. 1996); *Gotfryd v. Book Covers, Inc.*, 1999 WL 20925, *8 (N.D. Ill. 1999)(rejecting attempt to use EEOC guidelines to establish hostile workplace); *Magana v. Tarrant/Dallas*

Printing, Inc., 1998 WL 548686, *5 (N.D. Texas, 1998) ("English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII"); *Tran v. Standard Motor Products, Inc.*, 10 F.Supp.2d 1199, 1210 (D. Kansas, 1998)("the purported English-only policy does not constitute a hostile work environment"); *Mejia v. New York Sheraton Hotel*, 459 F.Supp. 375, 377 (S.D.N.Y. 1978)(chambermaid properly denied a promotion because of her "inability to articulate clearly or coherently and to make herself adequately understood in . . . English"); *Prado v. L. Luria & Son, Inc.*, 975 F.Supp. 1349 (S.D. Fla 1997)(rejecting challenge to English workplace policy); *Kania v. Archdiocese of Philadelphia*, 14 F.Supp. 2d 730, 733 (E.D. Penn. 1998) (surveying cases: "all of these courts have agreed that – particularly as applied to multi-lingual employees – an English-only rule does not have a disparate impact on the basis of national origin, and does not violate Title VII.").

There is, therefore, no basis in the terms, history or interpretation of "national origin" which supports a *per se* rule equating a person's language and that person's national origin.

2. A Per Se *Rule Equating Language and National Origin Has No Basis in Fact.*

Spanish is spoken in many countries,[12] impairing a determination that the language itself determines, under *Espinoza*, "the country from which his or her ancestors came." 414 U.S. at 88. Thus Hispanics are usually within a protected class not by virtue of language spoken, but by ancestry.

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[12]At least 13 countries have Spanish as their official or national language. A. Blaustein & D. Epstein, *Resolving Language Conflicts: A Study of the World's Constitutions*, (1986).

Hernandez v. Texas, 347 U.S. 475, 479-80 (1954)(persons of Mexican descent wrongfully excluded from jury duty).

A *per se* rule equating a person's language and national origin would be both over- and under-inclusive. Many Hispanics do not speak Spanish.[13] Many non-Hispanics speak Spanish.[14]

Nor is language an immutable characteristic, like "the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88. Although, for some people, learning a new language may be a difficult or unfinished task, *Garcia v. Gloor*, 618 F.2d at 270, in that aspect language may be much like alienage – not statutorily protected. Although alienage cannot be changed before qualification for naturalization, it can be changed eventually. *Sugarman v. Dougall*, 413 U.S. 634, 658 (1973)(Rehnquist, J., dissenting).

B. A *Per Se* Rule Equating Language and National Origin Is Unworkable

Providing services or assistance in many languages, as Executive Order 13,166 proposes for federal agencies,

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[13]The Rand Corporation reported in 1985 that by the second generation half the Hispanic immigrant children in California spoke English exclusively. Zall/Jimenez, *Official Use of English: Yes/No*, 74 A.B.A. J. 34, 35 (1988). And as the recent California school test scores described above demonstrate, language minority children can learn English quickly if not stopped by misguided government policies.

[14]The American Council of Teachers of Foreign Languages reported that 3,219,775 American high school students were taking Spanish language courses in 1994. Draper & Hicks, *Foreign Language Enrollment in Public Secondary Schools, Fall 1994*, Table 2. Contrary to popular belief, "people who got good grades in high school Spanish classes remembered much of the Spanish vocabulary up to 50 years after taking their last course." *College Classes Spur Lifelong Math Memory*, 138 Science News 375 (1990).

contractors or grantees could be costly and difficult. In the simplest example, increasing the number of languages increases the possibility of translation errors. *Hernandez v. New York*, 500 U.S. at 361, *citing, United States v. Perez*, 658 F.2d 654, 662 (9th Cir. 1981)[15]; *Seltzer v. Foley*, 502 F.Supp. 600, 603-4 (S.D.N.Y. 1980)(interpreter in magistrate's courtroom changed the motive of the accused without her knowledge). A 1985 report found that of 1,400 applicants, only 30 passed the federal certification test for Spanish language courtroom interpreters.

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[15]This Court quoted testimony from United States v. Perez, 658 F.2d 654 (CA9 1981), to illustrate the sort of problems that may arise even with an official translation:

> "DOROTHY KIM (JUROR NO. 8): Your Honor, is it proper to ask the interpreter a question? I'm uncertain about the word La Vado [sic]. You say that is a bar.
> "THE COURT: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me -
> "DOROTHY KIM: I understood it to be a restroom. I could better believe they would meet in a restroom rather than a public bar if he is undercover.
> "THE COURT: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the -
> "DOROTHY KIM: I understand the word La Vado [sic] - I thought it meant restroom. She translates it as bar.
> "MS. IANZITI: In the first place, the jurors are not to listen to the Spanish, but to the English. I am a certified court interpreter.
> "DOROTHY KIM: You're an idiot." Id., at 662.
>
> Upon further questioning, "the witness indicated that none of the conversations in issue occurred in the restroom." Id., at 663. The juror later explained that she had said "'it's an idiom'" rather than "'you're an idiot,'" but she was nevertheless dismissed from the jury. *Ibid.*

500 U.S. at 361, n. 3.

"Problems Cited in Greater Use of Court Interpreters," 16 CRIM. JUST. NEWSL. 13, 2 (1985).

More than 300 languages are spoken in the United States. U.S. Bureau of the Census, 1990 Table COHL 13: "Language Spoken At Home and Ability to Speak English for Persons 5 Years and Over." Many of those languages contain distinct dialects in which the same words mean different things. S. Berk-Seligson, *The Bilingual Courtroom*, 5 (1990) (citing Italian, Napolese and Sicilian as "different varieties of the same language."). Some of these dialectical differences could be legally significant, such as the Spanish word "guagua," which means "baby" in Nicaragua or Chile, but "bus" in the Dominican Republic. "The Fine Art of Interpreting in a Miami Court," *New York Times*, May 8, 1984, at A15, col. 1.

Courts are justifiably reluctant to impose those costs on governments which have not chosen to bear the burden. *See, e.g., Abdullah v. INS*, 184 F.3d at 166:

> The applicants in this case alone would require the provision of interpreters in Urdu, Hindi and Bengali. Upholding the right plaintiffs claim would no doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great.

See, also, Nazarova v. INS, 171 F.3d at 483:

> [T]he logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of the human race, and then select the proper one for each potential deportee. No court to our knowledge has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first.

See further, Toure, 24 F.3d at 446 (providing forfeiture notices in preferred language would "impose a patently unreasonable burden"); *Vialez v. New York City Hous. Auth.*, 783 F.Supp. 109, 120-24 (S.D.N.Y. 1991) ("insurmountable and unjustified burden on the Housing Authority").

C. A *Per Se* Rule Equating Language and National Origin Is Unwise

This Court noted in *Holland v. Illinois*, that "[t]he earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." 493 U.S. 474, 488 (1990). It would be difficult to cabin the lower court's equation of language choice and national origin. The most critical example is the Administration's adoption of the lower court's opinion in Executive Order 13,166 to expand the equating of language and national origin to every federal agency, contractor and grantee.

Although the primary question in this case is the existence of a private right of action, a misinterpreted phrase in an opinion from this Court could generate unintended controversies in other areas far beyond this case:

Language of Government Activities:

24 States have declared English their official languages.[16] These declarations are the subject of substantial

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[16] **Alabama**: Ala. Const. Amend. 509 (1990); **Alaska**: Ak. Stats. § 44.12.330 (1998); **Arizona**: Ariz. Const. Art. XXVIII (1988) (negated by Arizona Supreme Court – 1999); **Arkansas**: Ark. Stat. Ann. 1-4-117 (1987); **California**: Cal. Const. Art. III, § 6 (1986); **Colorado**: Colo. Const. Art. II, § 30 (1988); **Florida**: Fla. Const. Art. II, § 9

(continued...)

litigation. *See, e.g. Arizonans for Official English*, No. 95-974, 520 U.S. 34 (1997).

Other cases, like this one, involve challenges to governments' choices of English for internal operations. The lower court's analysis, for example, would have precluded the English-language civil service examination upheld in *Frontera v. Sindell*, 522 F.2d at 1218, and the English-language deportation, forfeiture, and benefit notices upheld in *Nazarova v. INS*, 171 F.2d at 483, *Soberal-Perez v. Heckler*, 717 F.2d at 41, *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973), *Toure v. United States*, 24 F.3d at 446, *Alfonso v. Board of Review*, 89 N.J. 41, 444 A.2d 1075, *cert. denied*, 459 U.S. 806 (1982), *Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), *cert. denied*, 414 U.S. 1137 (1974), and *Commonwealth v. Olivio*, 369 Mass. 62, 337 N.E.2d 901 (1975).

Language of Education:

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[16](...continued)
(1988); **Georgia**: Ga. Code Ann. § 50-3-30 (1986); **Hawaii**: Hawaii Const. Art. XV, § 4 (1978) (Hawaiian is second language) ; **Illinois**: Ill. Rev. Stat. Ch. 1, § 3005 (1969); **Indiana**: Ind. Code Ann. § 1-2-10-1 (1984); **Kentucky**: Ky. Rev. Stat. § 2.013 (1984); **Mississippi**: Miss. Code Ann. § 3-3-31 (1987); **Missouri**: Mo. Stats. § 1-028 (1999); **Montana**: Mont. Code Ann. § 1-1-510 (1995); **Nebraska**: Neb. Const. Art. I, § 27 (1920); **New Hampshire**: 1995 N.H. Laws 157 (1995); **North Carolina**: N.C. Gen. Stat. Ch. 145, § 12 (1987); **North Dakota**: N.D. Cent. Code, § 54-02-13 (1987); **South Carolina**: S.C. Code Ann. § 1-1-(696-698) (1987); **South Dakota**: S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995); **Tennessee**: Tenn. Code Ann. § 4-1-404 (1984); **Virginia**: Va. Code § 22.1-212.1 (1950); **Wyoming**: Wyo. St. 8-6-101 (1996). An initiative measure declaring English the official language is on the November 7, 2000 Utah ballot.

As noted above, the elimination of bilingual education reform is a rapidly-growing effort, driven by parents who want their children taught English. If this Court were to equate language and national origin, the federal agencies would roll back these bilingual education reforms, crushing the hopes and dreams of these parents and condemning their children to what the *New York Times* called "a bilingual prison." "A Bilingual Prison," *The New York Times*, September 21, 1995, A22.

Language of the Workplace:

As noted above and discussed in the Appendix to this brief, courts have overwhelmingly rejected the EEOC's presumption that English-on-the-job rules are national origin discrimination. *See, e.g., Gloor*, 618 F.2d at 270 ("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."); *Spun-Steak*, 998 F.2d at 1489-90 (EEOC Guidelines are *ultra vires*). These decisions would be wiped away if this Court recognizes the relationship between language and national origin posed by the decision below.

Amici respectfully urge the Court to reverse the decision below on the question of whether a person's choice of language can be equated to the person's national origin.

II. Federal Rules Which Affect Core Rights of the States to Choose English for Internal Operations Must Be Explicit

The decision below will require the State to speak in a language which its political processes have decided will harm its interests.[17] This Court has historically recognized States' rights

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[17]89% of Alabama's voters approved the State's English
(continued...)

to "regulate the content of what is or is not expressed when it is the speaker." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995). Though *Rosenberger* is a First Amendment case, it reflects this Court's concern for States' sovereignty.

A State defines itself as a sovereign "[t]hrough the structure of its government and the character of those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Several of these areas of State sovereignty lie beyond the general reach of federal laws, including the regulation of a State's internal operations. "A State is entitled to order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2264 (1999)("Such plenary federal control of state government processes denigrates the separate sovereignty of the States.").

This is not a new thought, as this Court noted over a century ago: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970)(Black, J., joined by the Chief Justice and three other Justices)("And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").

Under this Court's recent decisions, the Tenth Amendment protects the reservation of "original powers" of a State. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 801 (1995); *Alden*, 119 S.Ct. at 2259, *quoting, Nevada v. Hall*, 440 U.S. 410, 425 (1979).

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[17](...continued)
Language Amendment in 1990. Secretary of State, *Certification of Results of Election Held June 5, 1990*, June 20, 1990, 1.

A State's Tenth Amendment right to choose the language of its own internal operations is one of those historically-based core powers. Throughout American history, this Court has permitted States to use English. *Patterson v. De La Ronde*, 8 Wall. 292, 299-300 (1869)(Court reconciled French and English versions of Louisiana mortgage law); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)("The power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned."). And prior to the Constitutional Convention, the primacy of English was well-established. "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence, 1763-1815*, 18 (1972).

Like the choice of location of its own State Capitol, a State's choice to use English in conducting its affairs is a "function essential to [the State's] separate and independent existence." *Coyle v. Wyoming*, 221 U.S. 559, 595 (1911). Choice of the English language for internal State operations is thus an "original power," a core State function over which federal abrogation power is limited. Any federal abrogation, therefore, must be explicit and remedial. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 638 (1999). There are few, if any, such abrogations, and those identified in the decision below are neither clear nor remedial.

The lower court seemed to rest its entire view of federal regulatory power over States' internal language choices on this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974)(school district must provide some assistance to students who could not otherwise obtain an education). *See, e.g.*, 197 F.3d at 495-97, 504-07. Yet *Lau* was a narrow decision – focused specifically

on a particular problem in education – and not the type of clear, remedial abrogation envisioned by this Court's recent decisions. If left intact, the decision below will encourage other courts to use *Lau* to overrule States' internal decisions in other non-educational contexts, shoving that narrow, education-based decision far beyond its original limits.

This Court should protect these core States' rights by reversing the decision below.

CONCLUSION

Amici therefore respectfully urge the Court to reverse the decision below.

BARNABY W. ZALL
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7018 Tilden Lane
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November 9, 2000

APPENDIX

Appendix

Letter to Equal Employment Opportunity Commission

Thomas G. Tancredo
6th District, Colorado

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Committee on Education and the Workforce
Subcommittees:
Early Childhood, Youth and Families
Oversight and Investigations

Committee on Resources
Subcommittee:
Energy and Minerals

Committee on International Relations
Subcommittees:
International Operations and Human Rights
Africa

Congress of the United States
House of Representatives
Washington, DC 20515-0606

December 14, 1999

The Hon. Ida L. Castro
Chairwoman
Equal Employment Opportunity Commission
1801 L St., N.W.
Washington, DC 20507

Dear Ms. Castro:

Thank you for the Commission's October 20, 1999 response to my August 11 inquiry about the Commission's activities regarding English-on-the-job rules and the Commission's guidelines under 29 C.F.R. section 1606.7.

While I appreciate the information you provided, I wanted to share with you that I am troubled by the Commission's activities. Your letter, for example, says: "under the EEOC's Guidelines, speak-English-only rules are presumed to have an adverse impact based on national origin, and therefore violate Title VII of the Civil Rights Act of 1964, as amended." My concern is that federal courts have repeatedly held just the opposite, and I see no evidence that the Commission's view has any legal basis.

I have a strong commitment to the principle of non-discrimination. I also have a strong commitment to the concept of a federal agency's power being limited by the Constitution and Congress's statutory delegation of authority to the agency.

As a member of the Oversight Subcommittee of the House Committee on Education and the Workforce, I must judge the Commission's interpretation of Title VII as applied to English-on-the-job rules under the law as described by the federal courts.

I have now reviewed this question thoroughly. Every final federal court decision on English-on-the-job rules has held that such rules do not violate Title VII or that the Commission's guidelines are *ultra vires*. To quote just one of the more than a dozen federal courts which have looked at this question: "An agency interpretation, like that in 29 C.F.R. s. 1606.7, **at variance with the statute it interprets**, must be outside the scope of the agency's interpretive authority, and must be **wrong**." *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d 730, 735-736 (E.D. Penn. 1998) (emphases added).

This is a very strong denunciation of the Commission's view. A federal court, after substantial review of the evidence and the law, has judicially found that the Commission's Guidelines are "at variance with the statute it interprets," are "outside the scope of the agency's interpretive authority" (in other words, *ultra vires* -- beyond its power), and "wrong." Yet, unfortunately, the *Kania* court's position that the Commission's Guidelines are *ultra vires*, unfounded in Title VII and "wrong" is virtually unanimous among federal courts.

This is not a recent development which might have surprised the Commission. As you know, the Commission presented its draft Guidelines in briefings to the U.S. Court of Appeals for the Fifth Circuit in 1980; the Fifth Circuit rejected the Guidelines twice immediately thereafter. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113

(1981)(English-on-the-job rule not illegal as applied to bilingual employee); *Vasquez v. McAllen Bay & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(same as applied to non-English-speaking employee).

Other cases finding either that English-on-the-job rules do not violate Title VII or that the Guidelines are *ultra vires* and unlawful include:

- *Long v. First Union Corp.*, 86 F.3d 1151 (4th Cir. 1996), *affirming* 894 F.Supp. 933 (E.D. Va, 1995). *See* 894 F.Supp. 940 (Guidelines are *ultra vires* because Congress enacted a specific and detailed framework for the burden of proof in disparate impact cases, and the Guidelines directly contradicted the plain terms of the statute it purports to interpret).

- *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir.), *cert. denied*, 508 U.S. 910 (1993), *affirming*, No. 89-1679-Civ-T-17 (M.D. Fla. 1990)(citing *Gloor* for proposition that, where co-workers or customers can overhear, English-on-the-job rule does not violate Title VII; notes that legitimate business purposes included the ability of managers to know what was said in the workplace, and the ability of co-workers to know what was being said around them).

- *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2726 (1994)(in rejecting language-based claim by employees who hurled racial insults at co-workers in language co-workers could not understand, Guidelines struck down as illegal and *ultra vires*). An attempt to obtain rehearing by citing Title VII

was rejected by the full Ninth Circuit. 13 F.3d 296 (9th Cir. 1994).

- *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987)(on motion for summary judgment, rejecting Guidelines-based claim by radio announcer for disparate impact).

- *Tran v. Standard Motor Products, Inc.*, 10 F.Supp. 2d 1199 (D.C. Kansas 1998)(in rejecting language-based claim by employee who sexually harassed co-workers in a language other than English, found that business necessity includes insuring that all workers can understand each other, preventing injuries, and preventing co-workers from feeling they are being talked about; English-on-the-job rule did not create hostile work environment).

- *Roman v. Cornell University*, 53 F.Supp. 2d 223, 237 (N.D. N.Y. 1999)(after surveying cases, finding: "All decisions of which this Court is aware have held that English-only rules are not discriminatory as applied to bilingual employees where there is a legitimate business justification for implementing such a rule" and "Several courts have held that an English-only policy designed to reduce intra-office tensions is a legitimate business reason.")

These decisions completely undermine the Commission's Guidelines. Surely the Commission should know of these decisions, yet they are not provided to employees or reflected in the Commission's policies.

Nor is there any countervailing controlling legal authority. There are only three decisions which might support the Commission's Guidelines – and none of those is significant or broadly applicable. The first was *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989). In *Gutierrez*, court employees racially insulted co-workers in a language they could not understand; the Ninth Circuit upheld a title VII claim based on the Guidelines, suggesting that the employer's remedy was to fire African-American employees and hire Spanish-speaking supervisors. Several Ninth Circuit judges decried this opinion as a "let them eat cake" approach which would exacerbate workplace tensions. 861 F.2d 1187, 1194 (9th Cir. 1988). The Supreme Court of the United States not only vacated the *Gutierrez* opinion immediately without further briefing, but did so with an unusual reference to a passage indicating that the vacated opinion was to "spawn no legal consequences." 490 U.S. 1016 (1989).

It is unlikely that the Commission would want to rely on a vacated opinion which suggests firing African-American supervisors in order to permit continued racial insults in a workplace. Fortunately, the Commission's training and policy materials make no reference to *Gutierrez*.

The other decision is a recent rejection of a motion to dismiss. *EEOC v. Synchro-Start Products*, 29 F.Supp.2d 911 (N.D. Illinois, 1999). In *Synchro-Start*, Judge Shadur notes that he was "staking out a legal position that has not been espoused by any appellate court." 29 F.Supp. 2d at 915 n. 10. In addition, Judge Shadur also noted that he was only "crediting" the Guidelines at the very early stage of deciding a motion to dismiss. 29 F.Supp.2d at 912-13. Similarly, another decision

from the same District Court only two weeks before *Synchro-Start*, rejected an attempt to use the Guidelines to establish workplace hostility. *Gotfryd v. Book Covers, Inc.*, __ F.Supp. 2d ___ 1999 WL 20925, *8 (N.D. Ill. 1999).

The Commission probably will not want to rely heavily on a District Court opinion so specifically limited and contradicted in its own district. Unfortunately, the press coverage included in your letter to me indicates that personnel in the Chicago office do not share this discretion. An EEOC attorney is quoted as claiming that "courts are divided on the legality of such English-only personnel policies." This quote, which was given at the start of the lawsuit against Synchro-Start, is simply incorrect. At the time this quote was given, there were no courts which had rejected such policies, as Judge Shadur **later** recognized in his footnote in *Synchro-Start* saying that he was the first (though in all fairness, by now the Northern District of Illinois is divided on the validity of the Guidelines, as shown by *Synchro-Start* and *Gotfryd*).

The same article quotes another EEOC attorney as saying that English-on-the-job "policies are generally a manifestation of prejudice toward ethnic minorities." There is no such finding in the judicial cases, and it is difficult to believe that the EEOC attorney is applying some general factual finding rather than personal prejudice. I find no evidence that the Commission made such a general factual finding.

The most troubling note in the package of information, however, was the Chicago EEOC office's press release of January 21, 1999, in which John P. Rowe, District Director in Chicago, says that "One of our enforcement priorities in this jurisdiction is to make the Commission's Guidelines on 'English

only' rules a reality in the workplace. Judge Shadur's reference to the EEOC Guidelines and his decision permitting the case against Synchro-Start to keep moving ahead are very significant milestones and reinforce our commitment to the agency's enforcement priorities. We look forward to making further strides in this area."

It appears from this quote that the Chicago regional office has not reviewed or credited each of the more than a dozen federal judicial decisions rejecting the Commission's interpretation of Title VII as applied to English-on-the-job rules. It is difficult to determine what grounds the Chicago regional office has for believing that all those courts are wrong and the Commission interpretation is the only correct version.

There is a third (and most recent) decision, which is also contradicted in its own jurisdiction. As you know, the Commission sued Premier Operator Services of Desoto, Texas, alleging that its English-on-the-job rule violated Title VII. *EEOC v. Premier Operator Services*, __ F.Supp.2d ___, 1999 WL 1044180 (N.D.Texas, 1999). Magistrate Stickney refused to grant summary judgment in the case, finding that he must give "some consideration" to the Guidelines where there were genuine material factual disputes. Magistrate Stickney did not cite any decision involving English-on-the-job rules other than *Gloor*, which he said was not applicable to a situation where an employee "inadvertently" uses a language other than English. Yet an earlier decision by Judge Fitzwater in the same Northern District of Texas, citing *Gloor* and *Spun-Steak*, held flatly: "English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII." *Magana v. Tarrant/Dallas Printing, Inc.*, __ F.Supp.2d __, 1998 WL 548686, *5 (N.D.Texas 1998).

The summary of all these cases is that there is no judicial recognition of a legal basis for the Commission's Guidelines from any federal appellate court, and the lower courts largely reject the Guidelines. This lack of legal foundation for a federal enforcement policy troubles me.

I have reviewed the material you sent to me explaining the Commission's position in general and instructing its personnel about English-on-the-job rules. I find no mention of most of these cases. I find no significant legal analysis of the Commission's interpretation beyond a simple declaration of its conclusions. I find interpretations which contradict and ignore the straightforward and unanimous opinions of the federal courts which have reviewed English-on-the-job rules. In short, the materials I received from the Commission explaining its position and instructing its personnel were simply "wrong." *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d at 735-736.

That makes the case load report you sent to me all the more disturbing. According to your letter, in recent years, the Commission has carried an annual case load of between 120 and 150 charges against employers accused of violating Title VII by having an English-on-the-job rule. In the year ending August 26, 1999, the Commission "resolved a total of 121 charges on this issue." 49 of these charges were "resolved" by finding "no violation." Another 35 of these charges were "resolved" by closing prior to the end of an investigation. 27 employers were found to have "violations," apparently of Title VII, under the Commission's uniformly-rejected interpretation.

Because you did not provide me with sufficient data on these 27 "violations" of the Commission's interpretation, I

cannot tell where these employers are located, or whether the "violations" would survive a court test (for example, was the "violation" of Title VII based on the Commission's unlawful "presumption" that an English-on-the-job rule shifts the burden of proof onto an employer to justify the rule). This information is essential for me to determine the extent to which the Commission is abiding by the rules established by each of the Circuit Courts of Appeal which have rejected the Commission's interpretation.

You also listed seven lawsuits which had been filed, resolved or were pending during the year ending August 30, 1999. Three of these seven cases are in federal Circuits which have unequivocally rejected the Commission's interpretation of Title VII as applied to English-on-the-job rules.

In light of the above, please provide me with the following at your earliest opportunity:

1) a full and complete explanation of any legal rationale supporting the Commission's interpretation of Title VII as applied to English-on-the-job rules, including a) any materials relied upon by the Commission in adopting, reviewing and continuing in force 29 C.F.R. section 1606.7, and b) any materials used, reviewed or considered in any of the lawsuits referred to in your letter to me which provide any such legal rationale. I am particularly interested in reviewing the legal analyses in the materials the Commission provided the courts in *Synchro-Start* and *Premier Operator*.

2) A description of the geographic location of the described 27 employers found to be in "violation" of Title VII as interpreted by the Commission, preferably by location within

the circuits covered by each U.S. Court of Appeals. In addition, a description of whether the "violation" was considered to be of "adverse impact" or "treatment" under existing definitions. Also, a description of whether the "violation" was due to a presumption which was insufficiently rebutted by the employer, or whether the "violation" was proven by the investigation. You may remove all identifying information if required by statute, but the information I am requesting relates solely to actions taken by the Commission and its personnel, so redactions should be kept to a minimum.

3) A complete explanation of whether, and if so, how the Commission intends to revise its materials relating to English-on-the-job rules, including employee training and interpretation manuals, to reflect the current state of judicial decisions in this area.

While I will await the receipt of further information before making up my mind on further proceedings in this matter, I urge the Commission to review carefully its policies in this area. It is not in the national interest to extend federal power in this area any further than absolutely necessary. The Commission should recognize that when federal courts repeatedly say that it is acting illegally, serious reconsideration is warranted.

In addition, I urge the Commission to revisit this issue and its Guidelines at its earliest opportunity. If, in fact, regional office personnel are conducting their own policy pursuits, the Commission should exert control. If it is the Commission's own policy to "make the Commission's Guidelines on 'English only' rules a reality in the workplace," please let me know that as soon as possible.

Thank you for your attention to this matter.

Sincerely,

/s/
Tom Tancredo
Member of Congress

Response from Equal Employment Opportunity Commission to Cong. Tancredo

[seal]
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

Jan 21 2000

The Honorable Thomas G. Tancredo
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Tancredo:

This is in response to your letter of December 14, 1999, regarding the policy of the Equal Employment Opportunity Commission (EEOC) on "English-only" rules. Specifically, you requested that the EEOC provide the following: 1) an explanation of the EEOC's legal rationale regarding the application of title VII to English-only rules; 2) information regarding the 27 charges challenging English-only rules during the period of August 28, 1998, to August 26, 1999, in which the EEOC found violations; and 3) an explanation of any changes the EEOC intends to make to materials addressing the English-only rule. This letter will address each of these requests in turn.

EEOC's Analysis of the Application of Title VII to English-only Rules[1]

As you know, the EEOC has adopted the following guidelines on English-only rules:

> § 1606.7 Speak-English-only rules
> (a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it. [2]

[1]This section summarizes the EEOC's position on English-only rules. To provide a more detailed discussion of the EEOC's analysis, we have enclosed the initial and reply briefs filed by the EEOC as *amicus curiae* in support of rehearing en banc in *Garcia v. Spun Steak Co.*. Pursuant to your specific request, we have also enclosed the EEOC's response to defendant's motion to dismiss in *EEOC v. Synchro-Start Products, Inc.*, and the EEOC's opposition to defendants' motion for summary judgment in *EEOC v. Premier Operator Services, Inc.*, along with supporting materials.

> (b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employers can show that the rule is justified by business necessity.[2]

The guidelines reflect the EEOC's position that a rule requiring the use of English in the workplace can be reasonably presumed to have an adverse impact on the basis of national origin. As recognized by courts, an individual's primary language is closely tied to his or her national origin, which includes cultural and ethnic identity. The Supreme Court noted, "Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond." *Hernandez v. New York*, 500 U.S. 352, 370 (1991); *See also Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993)("It cannot be gainsaid that an individual's primary language can be an important link to this ethnic culture and identity.", *rehearing en banc denied*, 13 F.3d 296 (1993), *cert. denied*, 512 U.S. 1228 (1994); *Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328, 1330 (C.D.Cal. 1989)("A person's primary language is an important part of and flows from his/her national origin."). Even for bilingual persons who become assimilated into American culture and learn to speak English fluently, their primary language remains closely tied to their national origin. *Gutierrez v. Municipal Court of the Southeast Judicial Dist.*, 838 F.2d 1031, 1039 (9th Cir. 1988), *remanded with directions to vacate as moot*, 490 U.S. 1016, *vacated as moot*, 873 F.2d 1342 (9th Cir. 1989); *see also Spun Steak, Spun Steak* [*sic*] 13 F.3d 296,

[2]The guidelines also require employers to provide employees with adequate notice of the rule. 29 C.F.R. § 1606.7(c).

298 (Reinhardt, J., dissenting from denial of rehearing en banc) (even for bilingual individual, "native language remains an important manifestation of his ethnic identity and a means of affirming links to his original culture").

An English-only rule creates an atmosphere of inferiority, isolation, and intimidation based on national origin for non-native English speakers, *regardless of whether they can comply with the rule*. *EEOC v. Synchro-Start Prods., Inc.*, 29 F.Supp. 911, 915 (N.D. Ill. 1999). They face discipline or discharge for failing to comply with the rule. They must struggle to find the right words in English to communicate, and worry about speaking in the "correct" language. These individuals are adversely affected by knowing that their behavior has been singled out as unacceptable, and that the employer has adopted a rule that specifically applies to them. As Judge Reinhardt stated, "English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality." *Spun Steak*, 13 F.3d at 298 (Reinhardt, dissenting from denial of rehearing en banc).

Because of the close connection between an individual's primary language and his or her national origin, an English-only rule has a disproportionate adverse impact on protected national [3] origin groups. *E.g.*, *Spun Steak*, 998 F.3d at 1486 (it is "beyond dispute" that any adverse effect of an English-only rule would be suffered disproportionately by Hispanics); *Synchro-Start*, 29 F.Supp. at 912 (English-only rule "unarguably impacts people of some national origins (those from non-English speaking countries) much more heavily than others").

The effect of an English-only rule is to single out individuals whose primary language is not English by denying

them a privilege that is granted to native English speakers. An English-only rule bars individuals whose primary language is not English from speaking in their native tongue – the language they are most comfortable with – at the workplace. Although speaking on the job is a privilege of employment, it may not be meted out in a discriminatory fashion. *See, Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984)("[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all"). Thus, because only native English speakers are permitted to speak in the language they are most comfortable with, an English-only rule has an adverse impact on bilingual employees whose primary language is not English.

Because of these effects on non-native English speakers, the guidelines reflect the EEOC's presumption that an English-only rule has a disparate impact based on national origin as explained above. *See Synchro-Start*, 29 F.Supp. 2d at 914 (EEOC has taken modest step of inferring that English-only rule disadvantages foreign national because of his or her national origin). Such a presumption avoids the need to litigate the issue "over and over again on a case by case basis." *Spun Steak*, 13 F.3d 300 (Reinhardt, J., dissenting from denial of rehearing en banc).

Nevertheless, the EEOC recognizes that there may be appropriate circumstances where an employer can require employees to speak English in the workplace. For example, if close communications is required for safety reasons, such as in the drilling of an oil well or working in a laboratory with dangerous substances, it may be necessary to require that communications among coworkers be in a language

understandable by all persons directly involved in the conversation. *See* Section 623: Speak-English-Only rules and Other Language Policies, EEOC Compliance Manual (BNA) 623:0009-0016 (1984). By requiring an employer to explain the business justification for an English-only rule, the guidelines balance a reasonable presumption of adverse impact with the employer's right to adopt needed business practices.

The guidelines have been scrutinized by relatively few courts since their adoption in 1980. Among U.S. Courts of Appeal, only one circuit, the Ninth Circuit, has directly addressed the guidelines.[3] In *Garcia v. Spun Steak Co.*, 998 f.2d 1480, 1486 (9th Cir.), *rehearing en banc* [4] *denied*, 13 F.3d 296 (1993), *cert. denied*, 512 U.S. 1228 (1994), the court stated that a plaintiff challenging an English-only rule would have to prove that a protected class is disproportionately

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[3]Three other U.S. Courts of Appeals have issued decisions on English-only rules but have not addressed the EEOC's guidelines. In *Long v. First Union Corp.*, 894 F.Supp. 933 (E.D.Va. 1995), the district court rejected the EEOC's guidelines, but the Fourth Circuit affirmed in an *unpublished* decision without addressing the guidelines. 86 F.3d 1151 (4th Cir. 1996)(per curiam). The Fifth Circuit decision in *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), was issued prior to the adoption of the EEOC's guidelines. The court noted that it was considering the issue in the absence of any EEOC guidance. *Id.* at 268 n. 1. Finally, in *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 U.S.Dist. KEXIS 21692 (M.D. Fla. May 28, 1991), the district court found that the employer had established a legitimate business reason for applying an English-only rule to a bilingual individual, but did not address the EEOC's guidelines. The Eleventh Circuit summarily affirmed the district court in an unpublished, nonprecedential decision. 985 F.2d 578 (11th Cir.), *cert. denied*, 508 U.S. 910 (1993). For these reasons, none of these Courts of Appeals decisions can be interpreted as rejecting the EEOC guidelines.

disadvantaged by a policy that has a significant adverse effect on a term, condition, or privilege of employment. The court acknowledged that, if an English-only policy has any adverse effect on a term, condition, or privilege of employment, those effects would be disproportionately suffered by those of Hispanic origin. *Id.* The court also acknowledged, as did the employer, that such a policy might have an adverse effect on an individual who cannot speak English or whose English skills are very limited. *Id.* at 1487.[4] Accordingly, the court rejected the EEOC's guidelines on the grounds that they impermissibly presume that English-only policies have a disparate impact without requiring proof of such. *Id.* at 1490.

For the reasons explained above, the Commission disagrees with the decision in *Spun Steak*. In addition, we note that the majority in *Spun Steak* completely disregarded the reasoning in *Gutierrez v. Municipal Court of the Southeast Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988), *remanded with directions to vacate as moot*, 490 U.S. 1016 (1989), *vacated as moot*, 873 F.2d 1342 (9th Cir. 1989).[5] The court in *Gutierrez*

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[4]The court acknowledged that an English-only rule might have a disparate impact even on bilingual employees if enforced in a "draconian" manner, e.g., punishing an employee for a minor slip of the tongue, such as subconsciously substituting a Spanish word for an English word.

[5]The *Spun Steak* court merely stated that *Gutierrez* had no precedential value, and therefore, it was not bound by the reasoning in that decision. 998 F.2d at 1487 n. 1. Although *Gutierrez* was vacated and had no precedential value, it represented the views of the Ninth Circuit on English-only rules, and the validity of the case's reasoning was not affected because it was vacated on the grounds of mootness. *Spun Steak*, 13 F.3d at 301 (Reinhardt, J., dissenting from denial of

(continued...)

determined that the ease of compliance with an [5] English-only rule was of little or no relevance to the issue of whether an English-only rule has an adverse impact on minorities. *Id.* at 1041. Moreover, the court found that an English-only rule has a "direct effect on the general atmosphere and environment of the workplace." *Id.*

District courts that have considered the EEOC's guidelines have been divided. As you noted, some district courts have adopted the reasoning of the *Spun Steak* majority in rejecting the EEOC's guidelines.[6] Recently, however, the EEOC's guidelines have been upheld in two district court decisions in cases brought by the EEOC. In *EEOC v. Sunchro-Start Prods., Inc.*, 29 F.Supp. 2d 911, 914 (N.D. Ill. 1999), the court rejected the majority analysis in *Spun Steak*, and found the justification for the guidelines to be persuasive.[7] In *EEOC v. Premier Operator Services, Inc.*, No. 3:98-CV-198-BF, 1999 WL 1044180, at *6 (N.D. Tex. 1999), the court found that it was appropriate to defer to the EEOC's guidelines on English-

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[5](...continued)
rehearing en banc). Judge Reinhardt noted that the failure even to consider the reasoning of the unanimous decision in *Gutierrez* made it apparent that the only significant change was panel composition. *Id.*

[6]*E.g., Kania v. Archdiocese of Philadelphia*, 14 F.Supp. 2d 730 (E.D. Pa. 1998); *Long v. First Union Corp. of Va.*, 894 F.Supp. 933 (E.D. Va. 1995), *aff'd*, 86 F.2d 1151 (4th Cir. 1996)(*see* discussion of *Long* at note 3, above).

[7]In a decision issued two weeks earlier in the Northern District of Illinois, another district court judge rejected the plaintiff's reliance on the EEOC's guidelines, finding that they did not apply to the issue before it. However, the court did not address the validity of the guidelines. *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925, at *8 (N.D. Ill. Jan. 7, 1999).

only rules, and that evidence in the record demonstrated that bilingual individuals are better able to communicate in their primary language. The court determined that it was not controlled by a prior decision of the Fifth Circuit, *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), which upheld an English-only rule. The court in *Premier Operator* noted that the English-only rule at dispute in the case before it applied at all times, whereas *Gloor* specifically stated that it was only addressing a policy that did not apply during breaks, not one that applied at all times, and that it was issuing a decision in the absence of EEOC guidance.

In addition to the courts that have upheld the EEOC's guidelines, Congress implicitly approved the guidelines when it amended Title VII in 1991 to clarify the standard for proving disparate impact discrimination. During Senate discussions of the possible amendment of Title [6] VII through the Civil Rights Act of 1991, Senator DeConcini stated that several of his constituents had complained about English-only rules in the workplace. Senator DeConcini asked Senator Kennedy, one of the sponsors of the Civil Rights Act of 1991, whether the EEOC guidelines promulgated at 29 C.F.R. § 1606.7 relating to English-only rules would remain intact, and Senator Kennedy responded that the guidelines had worked effectively and that the new legislation would not affect them in any way. 137 Cong. Rec. 29,051 (1991). If Congress had viewed the guidelines as an unreasonable exercise of the EEOC's enforcement authority, it presumably would have altered them.

Finally, the Commission's guidelines have been supported by the Department of Justice. After the Ninth Circuit denied the request for en banc rehearing in *Spun Steak*, the Solicitor General filed a brief in support of the petition to the

Supreme Court to grant a writ of certiorari. The Solicitor General argued that the EEOC's guidelines reflect a "sound" interpretation of Title VII, and that the Ninth Circuit's decision is "wrong."[8]

The EEOC of course respects the rules of statutory interpretation set forth in courts decisions. With regard to English-only rules, however, only the Ninth Circuit has issued a controlling opinion on the validity of the guidelines, and the few district courts to have considered the question have been divided. In such circumstances, the EEOC, as the enforcement agency for the federal anti-discrimination laws, has a responsibility to continue to interpret the law and to promulgate and apply the analyses it thinks best reflect the language and spirit of Title VII. With the benefit of the EEOC's views on English-only rules, courts can make better-informed decisions when they confront this issue. As more jurisdictions issue decisions regarding English-only rules, the EEOC will continue to reassess its position as it does in other areas where the law is developing.

Summary of Charges

In our prior correspondence, we reported that between August 28, 1998, and Augst 26, 1999, 27 charges involving English-only rules were resolved after a cause finding had been issued. After further review of the charges, we determined that

[8]A copy of the brief supporting the petition for certiorari is enclosed.

3 of the 27 cases did not involve issues regarding English-only rules.[9]

Therefore, we are providing you with information on 24 charges. Those 24 charges were filed against 14 employers in the Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh [7] Circuits of the U.S. Court of Appeals. In 11 of the charges, violations were found under Title VII based, in part, on the presumption in the Commission's guidelines that an English-only policy has a disparate impact on protected national origin groups. Those charges were filed in the Third, Fourth, Fifth, Ninth, and Eleventh Circuits.

It should be noted that even for each of the above 11 charges, as instructed by Agency investigative procedures, the investigator performed an investigation to determine such matters as the scope of the English-only rule, to whom the rule applied, the manner in which the rule was applied, and the effect of the rule on the work environment. In addition, of the 11 charges, most challenged English-only rules that applied at all times in the workplace, in contrast to the less restrictive rule at dispute in *Spun Steak*, which did not apply during breaks or lunch periods.

EEOC offices in a jurisdiction that has issued a decision contrary to the guidelines continue to conduct the administrative process pursuant to the guidelines. Because the EEOC is charged with enforcing a federal law that has nationwide

[9]Two of the three cases challenged English-only policies, but cause findings were only issued on other issues raised in the charges. The third charge was miscoded in the computer as challenging an English-only policy.

application, the EEOC's policy is applied uniformly in all jurisdictions at the administrative level. Of course, the EEOC would not file a suit to enforce the guidelines if such suit has been precluded by governing circuit law.

The table below summarizes the 24 charges resolved between August 28, 1998, and August 26, 1999, after a violation was found because of an English-only rule:
[tabular material omitted] [8]

Revisions to Materials on English-only Rules

At this time, the EEOC does not believe that a change in its longstanding position on English-only rules would be appropriate. Accordingly, no changes in training materials or other EEOC documents will be made at this time. If the EEOC changes this view, it will propose appropriate changes to the guidelines, and revise internal materials to reflect any modified position.

We hope that this information is helpful in addressing the questions you have about the EEOC's policies on English-only rules. Please note that this letter does not constitute a written opinion or interpretation of the EEOC within the meaning of section 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b)>

Sincerely,
/s/
William J. White, Jr.
Acting Director of Communications and Legislative Affairs

Enclosures [omitted]

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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES ALEXANDER, *et al.*,

Petitioners,

vs.

MARTHA SANDOVAL, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* ROBERT C. JUBELIRER AND MATTHEW J. RYAN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Robert C. Jubelirer is the President *Pro Tempore* of the Senate of Pennsylvania. Matthew J. Ryan is the Speaker of the Pennsylvania House of Representatives. Both are parties to *Powell* v. *Ridge*, No. 98-1223, now pending in the United States District Court for the Eastern District of Pennsylvania, in which private plaintiffs have challenged Pennsylvania's state-wide school-funding policies under the federal Department of Education's Title-VI disparate-impact regulations. In an earlier decision in that case, the United States Court of Appeals for the Third Circuit held that those regulations support a private cause of action. *Powell* v. *Ridge*, 189 F.3d 387 (CA3), *cert. denied*, 120 S.Ct. 579 (1999). The viability of a private action under Title VI regulations is a dispositive issue in that case.*

SUMMARY OF ARGUMENT

In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court held that a statute that does not explicitly provide a private right of action may nevertheless imply such a remedy in certain discrete circumstances. None of those circumstances exists here. Most important, there is nothing in the legislative history of Title VI to suggest a congressional intent that there be private actions to enforce disparate-impact regulations promulgated under the authority of Section 602.

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* Both Petitioners and Respondents have consented to the filing of this brief, and letters of consent are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than the named *amici* made a monetary contribution to the preparation of this brief.

Touche Ross & Co. v. *Redington*, 442 U.S. 560, 575 (1979) (legislative intent is the "central inquiry").

In addition to the conclusive legal analysis, there are compelling policy reasons for the Court to reject the invitation to find a private right of action in those regulations.

Both the structure and purpose of the regulations require that they be applied in the first instance by the agencies that promulgated them. Agency expertise and discretion are necessary to determine not only when a disparate impact has arisen, but whether the disparate impact is one in need of a remedy or is, instead, one that is justifiable and not in derogation of the regulatory purpose.

Without that initial agency review, the Title-VI disparate-impact regulations will be subject to both inappropriate application and abuse. The agencies have promulgated regulations that commonly lack any definition of discriminatory "effect," either qualitative or quantitative, and enunciate no justifications or defenses for even the slightest disparate impact.[1] Since it would be absurd for the agencies to have intended to prohibit even the slightest statistical anomaly in a grant recipient's program, these factors suggest the need for agency discretion in identifying appropriate cases to pursue. Furthermore, the regulations commonly contain detailed administrative procedures.

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[1] See the appendix of this brief, which is a table showing whether the disparate-impact regulations of 23 federal agencies (1) define discriminatory effect, (2) authorize any defenses, (3) allow private administrative complaints or (4) provide an administrative enforcement process.

This factor, when combined with the simultaneous breadth and vagueness of the regulations, evinces an understanding by federal agencies that the administrative process, followed by judicial review when appropriate, would be used to evolve standards of federal grant administration for disparate-impact cases, rather than private suits.

Finally, inferring a private right of action to enforce Title-VI disparate-impact regulations would wreak havoc on a great many state programs, in particular state funding initiatives. In attempting to meet disparate needs, state legislatures often make funding decisions that, without any intent to discriminate as to race or ethnicity, generate statistical anomalies that would facially suggest disparate impacts. Since no state is homogeneous either racially or ethnically, almost any attempt to address disparate needs can result in a statistical "disparate impact." To allow private challenges to those decisions without the filter of agency expertise and discretion invites a scenario in which the states are faced with the Hobson's choice of constant litigation or funding initiatives that are strictly *per capita* without any modification no matter how legitimate and pressing the need. The results of that dilemma cannot be helpful to the states or their citizens – including, ironically, those who have most fervently pressed private actions under the Title-VI disparate-impact regulations.

ARGUMENT

I. Introduction

Respondent Sandoval's suit was based on regulations of two federal agencies: 49 C.F.R. § 21.5(b)(2) (Department of Transportation) and 28 C.F.R. § 42.104(b)(2) (Department of Justice), both of which require recipients of federal funds to not "directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting [individuals] to discrimination on the basis of their race, color, or national origin."

These regulations are substantially identical to regulations promulgated between 1964 and 1980 by dozens of other federal agencies, ostensibly under the authority of Section 602 of Title VI of the Civil Rights Act of 1964. It is undisputed that Section 602 does not, on its face, provide for a private action for injunctive relief or damages.

Accordingly, the question for the Court is whether Section 602 implies the existence of a private right of action to address alleged violations of the regulations promulgated under it. The relevant initial inquiry is: (1) whether the plaintiffs are part of the class for whose "especial" benefit the statute was created; (2) whether there was any indication of congressional intent to create or to deny a private remedy; (3) whether the implication of a private remedy is consistent with the underlying purpose of the statute; and (4) whether the matter is one traditionally

relegated to the states. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).[2]

Under each and every one of these criteria, the disparate-impact regulations fail to support a private right of action.

II. Section 602 and the disparate-impact regulations fail the *Cort* test.

Although, as noted, this Court has not yet addressed whether and how federal regulations may give rise to private actions, that issue need not delay the Court long in this case. Whatever test is applied, the result in this case is that the Section-602 disparate-impact regulations do not support private actions. We therefore briefly address the *Cort* factors as they apply to Section 602.

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[2] This Court has not expressly addressed the issue of when a regulation, as opposed to a statute, may give rise to an implied private action. Several of the courts of appeals have held that, if consideration of these factors suggests that the statute may give rise to a private action, the next inquiry is whether a particular regulation promulgated under that statute may give rise to a private action. The secondary inquiry includes two additional issues: (1) whether the agency rule is properly within the scope of the enabling statute; and (2) whether implying a private right of action will further the purpose of the enabling statute. *See, e.g., Angelastro* v. *Prudential-Bache Sec., Inc.*, 764 F.2d 939, 947 (CA3 1985).

A. Neither the statute nor the regulations seek to benefit an "especial class."

In *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979), Justice Stevens described the language of Section 901 of Title IX, which mirrors that of Section 601 of Title VI.

> Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case . . . this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case. . . . *Conversely, the Court has been especially reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large.*

441 U.S. at 690-91 n.13 (emphasis added). Section 601 enjoins intentional discrimination against any person on the basis of race or national origin. It is, in effect, an injunction to federal grant recipients against purposeful discrimination. *University of California Regents* v. *Bakke*, 438 U.S. 265, 284-85 (1978).

Section 602, by contrast, grants no similar right. Instead, it includes a command to federal agencies to promulgate regulations "to effectuate the provisions of [Section 601]. . . consistent with the achievement of the

objectives of the statute authorizing the financial assistance . . ." In a sense, Section 602 might be said to have the potential to benefit an "especial" class, *i.e.*, the victims of purposeful discrimination. However, Section 602 provides no substantive rights and is not self-executing. In contrast, therefore, with Section 601, it does not itself convey any benefit to any class. Rather, in the language of *Cannon,* Section 602 is a statute "that create[s] duties on the part of persons" (here the agency heads) "for the benefit of the public at large."

Moreover, it is implicit in the *Cort* test that the "especial" class must be one to which the plaintiff asserting the private right of action belongs. While agency regulations under Section 602 do, in part, address purposeful discrimination, they also go beyond it to prohibit unintentional effects of otherwise legitimate program administration.

B. Not only is there no indication of congressional intent to create a private right of action, there is a contrary indication.

Determining the intent of Congress is not only the second prong of the *Cort* test but also the "central" inquiry.[3] *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 575 (1979). There is nothing in the language of Section 602 that suggests that Congress intended there

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[3] This arguably should be the only prong, since, if Congress did or did not intend a result, why should any factor with less weight than a constitutional limit on congressional power frustrate its intent? *See Cannon,* 441 U.S. at 731 (Powell, J. dissenting).

to be private actions to enforce the resulting regulations.

Where a statute sets out remedies, a court should be reluctant to read others into it. *Transamerica Mortgage Advisors* v. *Lewis,* 444 U.S. 11, 19 (1979). Section 602 prescribes an *administrative* scheme for enforcement, including agency notice, an agency determination as to the insufficiency of voluntary means of securing compliance and a final agency report that must be filed with congressional committees. The various agency regulations provide more detail on the administrative process.

The legislative history is no more favorable to the idea that a private right of action should be inferred. When Congress enacted Title VI, legislators time and again made clear their understanding that Section 602 would not engender private actions: "Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 CONG. REC. H2467 (Feb. 7, 1964) (Statement of Rep. Gill). "[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." 110 CONG. REC. S6562 (1964) (Statement of Sen. Kuchel). "Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill." 110

CONG. REC. S7065 (Statement of Sen. Keating) (March 23, 1964).[4]

The courts that have found a private action have looked at a sort of ersatz legislative history comprised of post-enactment statements taken out of context. *See, e.g., Chester Residents Concerned for Quality Living* v. *Seif,* 132 F.3d 925, 933-34 (CA3 1997). Of course, such references are not legislative history. *See Teamsters* v. *United States,* 431 U.S. 324, 354 n.39 (1977); *Oscar Mayer & Co.* v. *Evans,* 441 U.S. 750, 758 (1979).

In the end, the legislative history does not support the idea that Congress intended there to be private actions to enforce Title-VI disparate-impact regulations.

C. Inferring a private action would not be consistent with the underlying purpose of the statute.

The purpose of Title VI is to eradicate purposeful discrimination in programs receiving federal funds. *Bakke*, 438 U.S. 265 at 284-85. To infer a private action from the disparate-impact regulations as the Eleventh and Third Circuits have done ultimately does not serve that purpose. Moreover, it brings about a number of societal and policy problems Congress could not have intended. Those issues will be discussed in detail in the next part of this brief.

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[4] Senators Keating and Ribicoff had sought a provision in Title VI modeled after 42 U.S.C. § 2000a-3 that would allow private enforcement. Congress declined.

D. Implying a private right of action would intrude on areas traditionally relegated to the states.

The final prong of the *Cort* analysis asks if the statute intrudes into areas of traditional state authority. In the context of Section 602, the answer to that question is not readily apparent because the statute does not itself address substantive areas of the law but instead commands dozens of federal agencies to promulgate regulations to do so.

There are two ways to address this part of the *Cort* analysis. First, we can examine the particular regulation at issue, the Department of Transportation's disparate-impact regulation, and its application in this case. There can be no dispute that licensing of drivers is and always has been a state function. Second, we can look at the enabling statute, Section 602. The fact that the provision provides a portal to dozens of regulations, a majority of which address functions traditionally relegated to the states, should counsel against inferring a private right of action.[5] Consider the cases in which

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[5] *See, e.g., Sandoval* v. *Hagan*, 197 F.3d 484 (CA11 1999) (driver licensing); *Chester Residents Concerned for Quality Living* v. *Seif*, 132 F.3d 925 (3d Cir. 1997) (state permits affecting siting); *Powell* v. *Ridge*, 189 F.3d 387 (3d Cir. 1999) (school funding); *Ceaser* v. *Pataki*, 98 Civ. 8532, 2000 U.S. Dist. LEXIS 11532 (S.D.N.Y. Aug. 14, 2000) (school funding); *Campaign for Fiscal Equity, Inc.* v. *State of New York*, 86 N.Y.2d 307, 655 N.E. 2d 661, 631 N.Y.S.2d 565 (1995) (school funding); *Goshen Rd. Environmental Action Team* v. *United States Dept. of Agriculture*, No. 98-2102, 1999 U.S. App. LEXIS 6135 (CA4 1999) (siting of facility); *Tolbert* v. *Ohio Dept. of Transportation*, 172 F.3d 934 (CA6 1999) (placement of highway noise barriers); *New York City Environmental Justice Alliance* v. *Giuliani*, 214 F.3d 65 (CA2 2000) (locating and maintaining garden plots).

Section-602 regulations have been used by private litigants: driver licensing, public education, road construction and zoning – all are areas of traditional state authority.

Can it be said that all Section-602 regulations delve into areas traditionally relegated to the states? No. But it can be said that the majority do and that the invitation implicit in the statute itself should counsel against the inference of a private right of action.

E. Consideration of the secondary issues described by the courts of appeals also suggests there should be no private action.

As noted above, this Court has never indicated if and when a regulation can give rise to a private action. However, the analyses of each of the courts of appeals to examine the issue include the question of whether the regulation is within the scope of the enabling statute. *See, e.g., Angelastro*, 764 F.2d at 947.

In this case, the regulation exceeds the scope of the statute. This Court has held that Title VI itself proscribes only purposeful discrimination. *Bakke*, 438 U.S. at 287. In *Guardians Association* v. *Civil Service Commission of New York City*, 463 U.S. 582 (1983), several members if the Court questioned whether disparate-impact regulations could be within the scope of such a statute. 463 U.S. at 611 n.5 (Powell, J., concurring) ("Administrative agencies do not have – and should not have – such lawmaking power."); 463 U.S. at

613 (O'Connor, J., concurring) ("it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory effect. Such regulations do not simply "further" the purpose of Title VI; they go well beyond that purpose.").

The regulations do not merely treat disparate impact as potential evidence of intentional discrimination that would violate Section 601. On their face, the regulations categorically prohibit disparate impact, even if unintended and justified by other program objectives.[6]

Because the validity of the regulations is now relevant to the question of the existence of a private right of action, the Court should follow Justice O'Connor's reasoning in *Guardians*. It will lead to the conclusion that the Department of Transportation regulation at issue in this case, at least in so far as it purports to prohibit unintentional disparate impacts, exceeds the scope of the enabling statute.

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[6] This can result in plaintiffs who may have a legitimate case of intentional discrimination in violation of Section 601 also pleading, as a backup theory with a lower burden of proof, a statistical disparate impact. *See, e.g., Rodriguez* v. *California Highway Patrol*, 89 F. Supp.2d 1131 (N.D. Ca. 2000) (racial profiling); and *Maryland State Conference of NAACP* v. *Maryland Department of State Police*, 72 F. Supp.2d 560 (D. Md. 1999) (same).

III. Title-VI disparate-impact regulations should be enforced by agency action rather than private action.

A. The structure of the regulations and the complexity of the necessary analyses require application of agency expertise.

Justice Marshall wrote 15 years ago in *Alexander* v. *Choate* that Congress intended that federal agencies would apply their expertise to determine which disparate impacts warrant attention under Title-VI regulations. 469 U.S. 287, 294 (1985). The Eleventh Circuit's decision allowing private actions to enforce Title-VI disparate-impact regulations ignores both the Court's admonition in *Choate* and the structure of the many Title-VI regulations themselves.

Most of the Title-VI disparate-impact regulations are based on a model promulgated more than three decades ago. That model categorically prohibits recipients of federal funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin . . ." *See, e.g.*, 49 C.F.R. § 21.5(b)(vii)(2) (Department of Transportation regulation). It does not define the sort of "effect" it prohibits and it does not offer any guidelines for determining when an "effect" can have incidental discriminatory impact, yet be justified. It is, of course, important to recognize that not all discriminatory "effects" should be unlawful or are undesirable. All laws discriminate, in the sense that choices are made about meeting different societal needs and prioritizing government action. Attempting to eliminate every

statistically disparate impact inevitably will, in some cases, not be "consistent with achievement of the objectives of the statute authorizing the financial assistance," which Section 602 requires the regulations to be. There ought to be an exercise of agency discretion to make that determination.

The determination can be complex. Consider the Environmental Protection Agency's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (the "Guidance"). The Guidance explains that the first step in an investigation will be to identify the affected population. The second step is to determine the demographics of the affected population by using "demographic mapping technology." The Guidance explains that "[i]n conducting a typical analysis to determine the affected population, [the Office of Civil Rights ("OCR")] generates data estimating the race and/or ethnicity and density of populations within a certain proximity from a facility or within the distribution pattern for a release/impact based on scientific models." The third step in EPA's investigation is to determine the universe of facilities and the total affected population. "OCR will determine the appropriate universe based upon the allegations and facts of a particular case." The fourth step requires EPA to determine if there is a disparate impact. The Guidance explains that "[s]ince there is no one formula or analysis to be applied, OCR may identify on a case-by-case basis other comparisons to determine disparate impact." The fifth step requires EPA to determine the significance of any disparity: "OCR will use trained statisticians to evaluate calculations done by investigators. After calculations are interpreted by expert opinion, OCR may make a *prima facie* disparate impact finding, subject to the recipient's opportunity to

rebut." In other words, at each step of the process, the EPA is to apply its technical expertise not only to determine if there is, in fact, a disparate impact but also to decide whether that impact is unlawful and undesirable.

The need for application of agency expertise is evident from the number of Title-VI disparate-impact regulations and the wide variety of issues addressed by their promulgating agencies. *See* Appendix.

Disparate impact, as contrasted to purposeful discrimination, is generally proven by resort to statistics. But almost every case presents the difficult question of which numbers should be compared to determine if there has been a disparate impact. Even in the more defined area of employment discrimination to which Title VII applies, the courts continue to struggle with what statistics are meaningful and how they ought to be compared. *See Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988). In the many varied and far broader circumstances presented in Title-VI cases, that struggle is magnified many times.

Consider *Chester Residents Concerned for Quality Living* v. *Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *cert. vacated as moot*, 524 U.S. 974 (1998). In that case, a group of citizens of Chester, Pennsylvania, challenged the issuance of a state permit allowing a hazardous-waste disposal site to be located in their community. The population of Chester was approximately 65 per cent African-American. For procedural reasons, that case never proceeded beyond the pleading stage. But, had the residents ultimately been put to the test of proving disparate impact, how

would they have done so? And how would the district court have evaluated whatever statistical evidence the residents offered? Moreover, if the project's location were changed as a result of the litigation, how would it not have a disparate impact on a predominantly white or perhaps Amish population? The EPA Guidance described, *supra,* calls for a complex statistical and demographic study guided at each step by the agency's expertise. The Guidance, moreover, while providing a process does not provide substantive policy. Surely that analysis ought not first be performed by a federal trial court.

Even a strong proponent of private actions to enforce Title-VI disparate impact regulations has acknowledged the problem:

> Defining the relevant affected population groups and comparison groups is more complicated in an environmental siting case. Depending on the facts in a particular case and the type of pollution, the relevant populations could be those living within one mile of a facility, or several miles from the site. There are even more complex problems in measuring the risks of carcinogenic and noncarcinogenic pollutants.

Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions,* 73 TUL. L. REV. 787, 801 (1999). Such a determination is best made in the first instance by an administrative agency with expertise and experience in making those "complex" determinations about which populations to compare and the extent of perceived

risks. In a recent law review article, one EPA official acknowledged that the agency's definition of the terms of its Title-VI disparate-impact regulation is "fluid and living." Melva J. Hayden, *A Perspective on the Environmental Protection Agency's Title VI and Environmental Justice Programs,* 10 FORDHAM ENV. L. J. 359 (1999).

The need for agency expertise is heightened by the categorical prohibition in the regulations of any disparate impacts, without any facial allowance for degree or justification, or need to meet underlying program objectives. To the extent a given agency might find that a particular practice, despite producing a disparate impact, is justified, it must do so on an *ad hoc* basis. However, if jurisdiction lies solely within the agencies, absurd, counter-productive or program-disruptive results can be avoided, despite the simplistic language of the regulations, through the simple device of agencies exercising "prosecutorial" discretion.

However, if there is a private right of action, the duty of the federal courts to exercise their jurisdiction is mandatory in the highest degee. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 464 (1964). Since the right of action would be grounded in the regulations, how then would a court be justified in ignoring them, merely to avoid in some cases the "incorrect" result?

For example, state programs to assist children in poor families are likely to have a racially disparate impact in areas where poverty is concentrated among racial or ethnic minorities. Do non-minority children from affluent families have a claim of disparate impact, because poverty, very predictably, is a "criteri[on] . . .

which has the effect of subjecting individuals to discrimination because of their race . . ."? Under the categorical prohibition of the regulations, they would appear to have a claim. Must the state, therefore, both broaden and level its aid programs for children to avoid a statistically disparate impact? Or should the court selectively apply the regulations, in effect giving the regulations themselves a racial/ethnic disparate impact?

These dilemmas should be addressed, if at all, by the agencies that, lemming-like, adopted a perhaps well-intentioned but simplistic model regulation more than two decades ago and that have since offered virtually no substantive guidance.

Proponents of private actions to enforce the regulations have argued that courts should merely import the defenses and justifications from Title VII. This argument lacks a justification for ignoring the plain text of the regulations. It also inappropriately assumes that the defenses and justifications applicable in the employment setting can be imported wholesale into the myriad situations governed by the Title-VI disparate-impact regulations. For example, Title VII allows a defense that a particular practice reflects a *bona fide* occupational qualification. 42 U.S.C. § 2000e-2(e). As a practical matter, it would be essentially impossible to impress that standard on a Title-VI regulation. In the context of state-government programs and activities, asking a court to decide whether legislative determinations are justified invites both practical difficulties and separation-of-powers concerns. As the Court noted in *Washington* v. *Davis*, 426 U.S. 229 (1976), when it declined to extend

disparate-impact analysis to Fourteenth-Amendment claims:

> [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

426 U.S. at 248 (footnotes omitted). Of course, with regard to Equal-Protection issues, the Court has long deferred to state legislative efforts to remedy local problems. *See New Orleans* v. *Dukes*, 427 U.S. 297, 303-04 (1976). That deference is due in part to the federal judiciary's well-established respect for the coordinate role of state legislatures and the complex problems with which they contend.

In a Title VII case the underlying premise is that there should be equal reward for equal effort in the workplace. In contrast, many state spending programs affected by the Title VI regulations have as their underlying premise a policy decision to address disparate needs. Addressing disparate needs, except in a non-existent homogeneous state, inevitably produces statistically disparate impact.

Rather than a judicial re-writing of the regulations to make sense of them, the federal courts

should direct plaintiffs to the agencies themselves. The agencies will then be able to use their administrative complaint procedures to consider each allegation of disparate impact and to apply their expertise to resolving those claims on a case-by-case basis.

Consider, for example, the Department of Defense Title-VI regulation. If a person believes a recipient of Defense Department funds has used some "criteria or method of administration" that causes a disparate impact, he may file a written complaint with the Department. 32 C.F.R. § 195.8(b). The Department will then conduct a "prompt investigation" into the allegations of the complaint. § 195.8(c). If the investigator determines that there has been no violation, he must notify both the complainant and the fund recipient in writing of that determination. § 195.8(d). If the complainant disagrees, he may seek quasi-judicial review within the agency of the investigator's determination. § 195.12. If the investigator concludes that there has been a violation, the Department must first attempt to resolve the violation by informal means. § 195.9. If those informal efforts fail, the Department may either terminate its funding of the recipient or take other enforcement action, such as referring the matter to the Department of Justice for litigation. *Id.* Before the Department may terminate funding, it must afford the fund recipient notice and an opportunity to be heard. § 195.10. If the result of the hearing is adverse to the fund recipient, it may appeal to the Secretary of Defense. § 195.11. Finally, if the Secretary sustains the fund termination, the aggrieved fund recipient may seek judicial review in court. § 195.12. At each step of that detailed administrative scheme, there is an opportunity for notice and an opportunity to be heard

before agency officials with the expertise and experience to evaluate the evidence as it relates to the specific mission of that agency.

Implication of a private action would bypass that procedure. Thus, a federal court would be the first to determine (in what might well be a complex area of law) what "criteria or methods of administration" in fact cause disparate impacts and which are justifiable and therefore lawful. The court would be the first to make those determinations, despite the fact that the agency that promulgated the regulation giving rise to the suit ought to have far greater, and more specific, expertise and the fact that the agency has a well-defined process in place for making both determinations. And, of course, the agency process includes both a provision for a remedy and a provision for eventual recourse to the courts for judicial review. *See* 42 U.S.C. § 2000d-2; *see, e.g.*, 14 C.F.R. § 1250.110 (National Aeronautics and Space Administration regulation); *see also*, Appendix.

In its cases examining the doctrine of administrative exhaustion, the Court has recognized many of the same policy issues described in this brief. Even in cases in which the statute that provides the controlling law does not expressly require exhaustion, this Court and the lower federal courts often require exhaustion in order to insure that agencies exercise discretion, apply expertise and generate a factual record. Thus, in *McKart* v. *United States*, 395 U.S. 185 (1969), the Court explained that

> The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, "[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy." This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise.

395 U.S. at 194 (*quoting* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-458 (1965)). Although this case does not expressly present an exhaustion issue, it squarely implicates the policy reasons underlying this Court's exhaustion jurisprudence.

IV. Allowing private actions to enforce Title-VI disparate-impact regulations wreaks havoc on governmental funding initiatives.

The practical effect of the Eleventh Circuit's decision in this case on states is enormous. States provide myriad programs and services. Each program or service involves communication by the state to participants or recipients. In most states, that communication is in English. In this case, the complainants are Spanish-speaking residents of Alabama. Had they been Farsi-speaking residents, or French-speaking, or Old-Church- Slavonic-speaking, the

result would have been the same (and the statistical anomaly even more pronounced).

The driver-licensing requirement at issue in this case is just one state function.[7] The Eleventh Circuit's decision invites disparate-impact suits because state troopers policing the highways speak English, because state tax forms are in English, because state bar exams are in English and because state highway signs are in English. These examples are nowhere near exhaustive. An application of Title-VI regulations that equates any statistical anomaly with unlawful state action would have widespread ramifications for every state or local government activity – even with regard to the narrow language issue presented in this case.[8]

Of course, the central *legal* issue presented in this case has implications far broader than the particular facts regarding Alabama's licensing system. Plaintiffs have, in the last decade, increasingly turned to Title-VI disparate-impact regulations to challenge

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[7] The fact that Alabama has chosen to codify its English-only requirement is of no moment. Most states at least unofficially communicate only in English and there is nothing in the Eleventh Circuit's decision, or in the regulation, that would distinguish between their informal practices and Alabama's codified practice.

[8] The issue here is not English versus other languages. The regulations could in theory affect the Commonwealth of Puerto Rico by requiring it to make special accommodation not only for English-speaking residents and visitors but for speakers of all other tongues, in all of its subsidized functions that are normally conducted in Spanish. This burden would be no more appropriate to impose than what is sought in this case.

everything from subway fares and school funding to driver licensing and environmental permitting.[9]

The General Assembly of Pennsylvania, for example, annually appropriates subsidies to 501 public school districts. The subsidy formula is based on factors that are facially neutral with regard to race and ethnicity. The formula changes from year to year but usually uses the previous year's subsidy as a baseline and then weighs the size of student population, the growth of population, the local tax-raising potential of a school district (including both the market value of local real estate and taxable personal income) and the number of students at poverty level. 24 P.S. § 25-2502.35. These facially neutral policies result in statistically disparate impacts on a variety of racial and ethnic bases in a very diverse state. For example, the school district with the largest minority student population in the state gets close to 150 per cent of the

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9 *See, e.g., Sandoval* v. *Hagan*, 197 F.3d 484 (CA11 1999) (driver licensing); *Chester Residents Concerned for Quality Living* v. *Seif*, 132 F.3d 925 (3d Cir. 1997) (environmental permitting); *Powell* v. *Ridge*, 189 F.3d 387 (3d Cir. 1999) (school funding); *Ceaser* v. *Pataki*, 98 Civ. 8532, 2000 U.S. Dist. LEXIS 11532 (S.D.N.Y. Aug. 14, 2000) (school funding); *Campaign for Fiscal Equity, Inc.* v. *State of New York*, 86 N.Y.2d 307, 655 N.E. 2d 661, 631 N.Y.S.2d 565 (1995); *Goshen Rd. Environmental Action Team* v. *United States Dept. of Agriculture*, No. 98-2102, 1999 U.S. App. LEXIS 6135 (CA4 1999) (siting of wastewater treatment facility); *Tolbert* v. *Ohio Dept. of Transportation*, 172 F.3d 934 (CA6 1999) (placement of highway sound barriers); *New York City Environmental Justice Alliance* v. *Giuliani*, 214 F.3d 65 (CA2 2000) (locating and maintaining garden plots); *Rodriguez*, 89 F. Supp.2d 131 (racial profiling); and *Maryland State Conference of NAACP*, 72 F. Supp.2d 560 (same).

state subsidy that it would receive on a *per capita* basis. Likewise, the effect on many predominantly white, but affluent districts, is disparate, in that they get much less *per capita* from the state treasury, although white, rural but poor districts get more than the affluent districts.

No formula, other than a flat per student appropriation, could possibly avoid some disparate impact in Pennsylvania. The Commonwealth has both large urban centers and the largest rural population in the nation. It has large African-American and Asian (more recently including Vietnamese) racial minorities. It has unrivaled ethnic diversity, including not only its well-known Amish population, but Hispanic and Eastern European groups that still celebrate their distinctive heritages. Leveling the subsidy to avoid any statistical ethnic or racial anomalies would defeat the purpose of the subsidy.[10] Yet increasing one district's

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10 In *Powell*, the Third Circuit, in reversing the district court's dismissal of a disparate-impact claim concerning the state's school subsidy, said, "Here, the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend. A court order directing the state to equalize funding between these school districts would redress this comparative injury." 189 F.3d at 403. The court of appeals had before it only the complaint that had been dismissed and the statutory funding formula. It did not deal with the actual facts. If the district court, on remand, finds (as we are sure it will) that, contrary to the allegations of the complaint, the disparate impact of the state's funding formula favors non-white children over white children, could the district court ignore the mandate of the court of appeals, just because the plaintiffs would thereby get *less* money than they are

subsidy to placate a plaintiff group would only prompt another lawsuit from another school district because of the new disparity resulting from the litigation.

No scheme of taxation or distribution of state or local funds "has yet been devised which is free of all discriminatory impact." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 41 (1973). The Commonwealth's funding system – and the federal courts sitting in the Commonwealth – would be subject to a pendulum-like dynamic among the differing claims of various racial and ethnic groups, if private actions under the regulations are countenanced.

Almost every state funding initiative would be subject to the same challenge as Pennsylvania's education subsidy. For example, some states have programs to assist their less-fortunate citizens heat their homes in the winter.[11] Such a state subsidy, targeted as it must be to the state's most impecunious citizens, could almost certainly be subject to challenge for engendering some statistical anomaly. But is such a statistical disparity acceptable because of the greater good provided by the program? Common sense says

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presently receiving? Could the district court ignore the precedent of *Powell* if a largely white school district filed suit because it was in fact getting far less from the state? In adhering to the regulations, the court of appeals was indifferent to the state's struggle to deal with disparate needs. It shows how ill-suited the courts are for resolving the conundrums created by the agency regulations.

11 *See, e.g.,* Pennsylvania Supplemental Low-Income Energy Assistance Program, 62 P.S. §§ 3015, *et seq.*; *see also, Colorado low-income families to receive $23 million in home-heating aid*, Associated Press, Nov. 3, 2000.

that it should be, but the regulations make no exception for common sense.

Most states provide subsidies for health insurance for children.[12] Such programs typically provide greater benefit to members of minority groups.[13] The public accepts the disparity because it is a necessary means for the states to address their citizens' disparate needs. The regulations do not exempt such a program. The same could be said of state subsidies for public transportation and for school lunches (both disparately benefiting urban minorities, not suburbanites), for adult day care and many more.

This Court long ago recognized the mischief inherent in subjecting state fiscal programs to federal review.

> Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. . . . Appellees would have the Court intrude in an area in which it has traditionally

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12 *See, e.g.,* Pennsylvania Children's Health Care Act, 62 P.S. §§ 5001.102, *et seq.*; *see also,* Teresa Mask, *Advocates propose insuring 500,000 more across state,* Chicago Daily Herald, Oct. 13, 2000, at A11.

13 *Id.*

> deferred to state legislatures. This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause.

Rodriguez, 411 U.S. at 39-40. If the courts should be reluctant to interfere with state fiscal programs even when challenged as purposefully discriminatory, the courts should be doubly loathe to interfere when the only claim is of unintentional, statistical differences.

State and local governments make complex decisions all the time about how to allocate public funds. As Justice Powell wrote for the majority in *Rodriguez*, most expenditures by state and local governments are aimed at extending benefits to their citizens. 411 U.S. at 40. But every such expenditure invites a challenge that it was not enough or that it did not benefit the right people. This Court has long recognized the difficult decisions state and local governments face and has afforded them sensitivity and leeway in how they make those decisions.

The extension of a private right of action to enforce Title-VI disparate-impact regulations is at odds with that sensitivity. Allowing private actions to challenge those governmental decisions without the filtering effects of agency expertise, discretion and policy considerations would place state and local governments in an untenable position. Almost every decision made by state and local government actors would invite the same micromanagement by private lawsuit.

This Court has held that disparate-impact analysis is viable in the context of employment-discrimination cases *not* because it is appropriate to punish employers for statistical anomalies, but because statistics can sometimes provide a means for demonstrating with a high degree of certainty that a particular practice causes discrimination on the basis of race, ethnicity or gender despite the lack of any intent that it do so. *Watson*, 487 U.S. at 976-78. Even in the relatively narrow confines of employment cases, the Court has recognized that there is, in disparate-impact analysis, a risk of improper reliance on statistics and misguided presumptions about causation. 487 U.S. at 995-96; *see also, Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989). For the reasons noted above (and many others), reviewing state and local government decisions about allocation of public resources through the lens of disparate-impact analysis requires a discerning eye and an appreciation of both the proper technical comparisons and of the circumstances when statistical disparities might be justified by other, valid considerations.[14]

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[14] In emphasizing the role of the administrative process, we are not conceding that the regulations are valid or enforceable even by the agencies or that any private complainant would have standing in the administrative process, but those are issues for another day. We also do not believe that the regulations overcome Eleventh-Amendment immunity in private actions, but that issue is not now before this Court.

CONCLUSION

Amici Robert C. Jubelirer and Matthew J. Ryan respectfully request that the Court reverse the decision of the Eleventh Circuit.

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APPENDIX

COMPARISON OF FEDERAL AGENCIES' DISPARATE-IMPACT REGULATIONS

Agency	Disparate impact/effect defined?	Defenses or justifications recognized?	Can private persons file administrative complaints?	Administrative enforcement process against grantees?
Dept. of Agriculture, 7 C.F.R. §15.1, *et seq.*	No	No	Yes	Yes
Dept. of Energy, 10 C.F.R. §1040.1, *et seq.*	No	No	Yes	Yes
EPA 40 C.F.R. §7.25, *et seq.*	No	No	Yes	Yes
HUD, 24 C.F.R. §1.1 *et seq.* and 24 C.F.R. §180.100, *et seq.*	No	No	Yes	Yes
Dept. of Commerce, 15 C.F.R. §8.1, *et seq.*	No	No	Yes	Yes
Dept. of Education, 34 C.F.R. §100.1, *et seq.*	No	No	Yes	Yes
Dept. of Defense, 32 C.F.R. §195.1 *et seq.*	No	No	Yes	Yes

App. 2

Agency	Disparate Impact/Effect Defined?	Defenses or justifications recognized	Can private persons file administrative complaints?	Administrative enforcement process against grantees?
DHHS, 45 C.F.R. §80.1, *et seq.*	No	No	Yes	Yes
Dept. of Interior, 43 C.F.R. §17.1, *et seq.*	No	No	Yes	Yes
Dept. of Justice, 28 C.F.R. §42.1 *et seq.*	No	No	Yes	Yes
Dept. of Labor, 29 C.F.R. §31.1 *et seq.*	No	No	Yes	Yes
Dept. of State, 22 C.F.R. §141.1, *et seq.*	No	No	Yes	Yes
Dept. of Trans., 49 C.F.R. §21.1 *et seq.*	No	No	Yes	Yes
Dept. of Vet. Aff's., 38 C.F.R. §18.1, *et seq.*	No	No	Yes	Yes
ACTION, 45 C.F.R. §1203.1, *et seq.*	No	No	Yes	Yes
Off. Personnel Mgt., 5 C.F.R. §900.401, *et seq.*	No	No	Yes	Yes

App. 3

Agency	Disparate impact/effect defined?	Defenses or justifications recognized?	Can private persons file administrative complaints?	Administrative enforcement process against grantees?
NRC, 10 C.F.R. §4.1, *et seq.*	No	No	Yes	Yes
NASA, 14 C.F.R. §1250, *et seq.*	No	No	Yes	Yes
TVA, 18 C.F.R. §1302.1, *et seq.*	No	No	Yes	Yes
AID, 22 C.F.R. §209.1, *et seq.*	No	No	Yes	Yes
GSA, 41 C.F.R. §101-6.2, *et seq.*	No	No	Yes	Yes
Nat. Found. Arts, 45 C.F.R. §1110.1, *et seq.*	No	No	Yes	Yes
Nat. Science Found., 45 C.F.R. §611.1, *et seq.*	No	No	Yes	Yes

(12)

No. 99-1908

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IN THE

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JAMES ALEXANDER,
DIRECTOR, ALABAMA DEPT. OF PUBLIC SAFETY, *et al.*,
Petitioners,

v.

MARTHA SANDOVAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF's mission is to enable conservative and pro-family men and women to participate individually and collectively in the process of self-government and public

---

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

policy making so that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise. In particular, Eagle Forum ELDF defends the Constitution and its language against modification by any mechanism other than the amendment or convention procedures.

SUMMARY OF ARGUMENT

Must the State of Alabama speak in a language other than English? Although this issue is simply restated, its ramifications are unbounded.

This Court squarely rejected, in *Employment Div. v. Smith*, *infra*, the argument that religious practices require exemptions from generally applicable laws. Demands for exemption from official use of language, in the context of a state-conferred privilege, must likewise fail. The holding of the court below, if affirmed, would eviscerate the *Employment Div.* precedent and thereby require revisiting the issue of whether religious practices associated with national origin are entitled to exemptions from generally applicable laws.

Moreover, neither the Constitution nor its implementing legislation requires official use of any language other than English. The Constitution itself cannot be translated, in a binding manner, into any other language without complying with the amendment or convention procedures, because translation necessarily involves changes in meaning. There can be no "separate but equal" languages for developing law under the Constitution. Neither Congress nor the States, acting individually, can create a separate language for developing or implementing laws that impact the constitutional rights of the citizenry.

Finally, the Constitution disfavors language balkanization for the reason that it encourages secession. The former promotes the latter, as the Quebec controversy demonstrates, and

any statutory ambiguities in this area must be construed against language balkanization.

ARGUMENT

The Constitution does not require exemptions for language from generally applicable laws. Part I explains that the decision below is contrary to Supreme Court precedent establishing that exemptions from generally applicable laws are not required for religious practices. Under this precedent, exemptions for language are likewise not required, regardless of association with national origin. Part II emphasizes that neither the Constitution nor implementing legislation can require official use of any language other than English.

I. The Constitution Does Not Require Exemptions for Language from Generally Applicable Laws Under *Employment Div. v. Smith.*

Conceptually, plaintiffs' argument for an exception from a generally applicable law here is no different from an issue this Court resolved a decade ago. *Employment Div. v. Smith*, 494 U.S. 872 (1990). There the State of Oregon enacted a generally applicable law that had a disparate impact on a religious practice of individuals of a certain national origin.[2] Here, the State of Alabama enacted a generally applicable law that arguably has a disparate impact on language used by individuals of certain national origins. Neither the law of Oregon nor of Alabama entailed intentional discrimination. In both cases, the issue was whether the State must create exceptions to its generally applicable law in order to alleviate

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[2] In *Employment Div. v. Smith*, the Court considered application of the First and Fourteenth Amendments to require an exemption from a generally applicable law, while here the Court considers application of implementing legislation under the Fourteenth Amendment to require an exemption from a generally applicable law.

certain disparate impacts on individuals of certain national origins.

As this Court held in *Employment Div. v. Smith*, a State need not create exceptions to generally applicable laws for the practices of individuals. Language practices, like religious practices, are not exempt from such laws. Just as society need not and cannot treat all customs as equal, government need not and cannot accommodate or allow all languages in all official circumstances. The licensing of air traffic controllers at O'Hare Airport in Chicago, for example, does not and should not treat all languages equally. The English language is clearly preferable for that purpose. Similarly, a State judge does not have the right (or duty) to publish opinions in a language other than English. The State need not accommodate individual language preferences as exceptions to its generally applicable laws, just as it need not accommodate customs associated with individuals of certain national origins.

Languages develop in a manner similar to customs, and are cherished in similar ways. Both are as varied as the world population itself, and often have correlations with national origin. Both sometimes conflict with generally applicable laws. When there is conflict, States have no obligation to create exceptions for languages to generally applicable law.

A. The *Employment Div. v. Smith* Rule Should Apply to Language as Well as to Religious Practice

While the State must view all men as equal, it cannot view all languages and customs as equal. Generally applicable laws prohibiting drug use need not be riddled with exceptions. Likewise, laws mandating the use of the English language by air traffic controllers are essential to public safety. Generally applicable laws about licensing motor vehicle drivers are valid as well.

This Court established the standard of review for state legislation impacting certain religious practices in *Employment Div. v. Smith, supra*. At issue there was a Native American religious practice of ingesting peyote, a hallucinogenic drug. The State of Oregon prohibited use of this drug. When the Respondents Smith and Black were fired from their state jobs for using peyote at a Native American ceremony, their unemployment benefits were denied. The Oregon Supreme Court held that Smith and Black had a protected constitutional right to the ceremonial use of peyote.

In a 6-3 decision, this Court reversed. Individuals are not entitled to exceptions from generally applicable laws, even if those laws conflict with the religion of the individual. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." 494 U.S. at 878-79. True for religious practices, this must be true for language preferences as well. Generally applicable regulations – particularly with respect to State-conferred privileges – cannot be riddled with exceptions based on individual religious practices. "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 890.

This holding applies with even greater force to legislation concerning the language of official state documents, which does not even implicate the First Amendment. Although languages, like customs, are often dearly cherished, it is "the unavoidable consequence of democratic government" that legislation will operate to disfavor certain languages and customs. The State has no obligation to extend benefits to those engaging in religious practices prohibited by law; *a*

fortiori, the State has no duty to provide licensing tests in languages other than the official language.

B. If Some Exceptions are Required to a Generally Applicable Law Concerning the Official Language, Then Countless Additional Exceptions Will be Necessary.

Under the decision of the court below, there is no limit to the accommodations that Alabama would have to make for other languages on its licensing tests. The decision could require Alabama to rewrite its driver's license test in every language of the world in order to accommodate every future applicant. "Four to five thousand languages are thought to be in current use. This figure is almost certainly on the low side." George Steiner, *After Babel: Aspects of Language and Translation* 53 (3d ed. 1998). This would create an enormous bureaucratic burden for Alabama, and a legal quagmire as to where, if at all, a limit can be imposed on translating the test into a different language.

This slippery slope also extends across licensing subject matter. If driver's license tests must be provided in multiple languages, so should other licensing tests administered by the State. Should a physician be able to demand that a medical licensing test be provided to him in a foreign language? Can an attorney demand that a state bar exam be in a foreign language? Likewise for electricians, mechanics, accountants, engineers, barbers, and numerous other licensed practitioners?

Worse, this slippery slope cannot be limited to exemptions for language. Customs and practices associated with national origin must also be exempt. The holding of the court below requires a State to modify generally applicable laws to use "comparably effective alternative practice which would result in less disproportionality" in impact on a group protected by Title VI. *Sandoval v. Hagan*, 197 F.3d 484, 507 (11th Cir. 1999) (quoting *Elston v. Talladega County Bd. of Educ.*, 997

F.2d 1394, 1407 (11th Cir.1993)). It is impossible to limit the holding below to language, and it must extend to various practices as well – including the alleged right to ingest peyote that was rejected in *Employment Div. v. Smith.*

The court below erred in holding that, because Alabama recognizes driver's licenses from other states, some of which have other language requirements, it must relax its own testing requirements. *See* 197 F.3d at 508 ("The court also found that licensed drivers from other states and countries were able to obtain an Alabama driver's license without having to take the Department's written exam – irrespective of their fluency in the English language. These factual findings demonstrate that Appellants' policy significantly impacts Alabama residents of foreign descent, in both an adverse and disproportionate manner."). The extension of full faith and credit by Alabama to the licenses of other states does not require Alabama to imitate the relaxed licensing requirements of others. State law is replete with examples, from marriage to divorce, of states recognizing determinations by other states without imitating the standards of those other states.

C. Alabama's Selection of English as the Language for Testing Drivers is Clearly Justified.

English is the most widely used language in the world outside of China, an important consideration for situations in dealing with strangers. English features a syntax that easily adapts to the style of the speaker, who can use nouns as verbs and vice-versa and still be understood. Because the forms of English words have comparatively little variance depending on usage, basic English can be learned more quickly than other languages. If one simply strings together English nouns and verbs in their most elemental form, a listener is likely to understand, in contrast to the confusion caused in most other languages. Certain Asian languages even have different

meanings for words depending on the spoken pitch, creating a potential for confusion by novices.

"Land plane now?" is a question that would be dangerous if misunderstood. The best way to minimize misunderstandings for traffic-related statements is to require that licensed pilots and air traffic controllers understand English – which is what non-English-speaking countries around the world are now requiring. The New York City Bar Association has recommended mandatory English, citing this example:

> In 1993, Chinese pilots flying a U.S.-made MD-80 were attempting to land in northwest China. The pilots were baffled by an audio alarm from the plane's ground proximity warning system. A cockpit recorder picked up the pilot's last words: "What does 'pull up' mean?" What is needed, both in the U.S. and worldwide, is a mandatory spoken English test for pilots and controllers.

"Aeronautics Committee of New York City's Bar Association Seeks to Raise the Bar on Safety", 12 Air Safety Week, at 33 (Aug. 17, 1998).

Other examples abound. The well-publicized crash of ValuJet Flight 592 in the Florida Everglades in 1996, killing all 110 on board, was caused by mistakenly loading oxygen canisters as cargo. The investigation revealed that the canisters labeled as "repairable" had been misunderstood as "empty", and at one point the National Transportation Safety Board suggested that the use of non-English speaking mechanics may have been a problem. William Langewiesche, *"The Lessons of ValuJet 592"*, 281 Atlantic Monthly No. 3, 81 (Mar. 1998).

With respect to the worst air disaster of all-time – the crash of a KLM 747-200 into a Pan Am 747-100 in Tenerife, Canary Islands in 1977 – the official report found that "inadequate language" was a cause. The KLM pilot used the

phrase "we are now at take-off" when he meant to state that he was now taking off, and thereby proceeded to crash into another airplane on the runway and kill 583 persons on both planes. *Report of the Secretary of Civil Aviation, Spain* (Oct. 1978), *reprinted in* Aircraft Accident Digest (ICAO Circular 153-AN/56, 22-68).

In absolute and percentage numbers, car accidents far outnumber airplane accidents. In 1998, 21.3 million drivers were involved in motor vehicle accidents in the United States. *See* 2000 World Almanac 895 (1999) (citing National Safety Council). To ameliorate injuries and minimize deaths, effective communication among numerous strangers after an accident is essential. These communications include immediately directing traffic around the accident, discussing the situation with police and paramedics, exchanging information among those involved in the accident, and making arrangements for removing the vehicles and passengers.

The lower court attached great significance to the fact that Alabama has made some accommodations for the deaf and illiterate in its driving exams. But these kind-hearted gestures should not be construed as obliging the state to make every other possible accommodation. The deaf and illiterate are still capable of communicating in English and, therefore, allowing them to drive is consistent with the principle that English is a necessity for driving. If an illiterate person has an accident, or is stopped by a cop, he can still explain himself orally in English. Likewise, a deaf person can communicate in written English. Moreover, the deaf are incapable of hearing while the non-English speakers are capable of learning basic English. If a policeman stops a driver who does not speak English, the driver may not even understand why he has been stopped, and the officer may have no appropriate way of dealing with the problem.

Allowing a Tower of Babel to exist in traffic situations can only result – as with airplane accidents cited above – in unnecessary safety hazards and even loss of life. Government can and should prevent this by requiring a uniform language for licensing purposes. Licensees must be able to understand basic instructions, directions, and road signs in the common language, in this case English.

D. The Federal Government Itself Requires English Proficiency as a Condition of Naturalization, and Issues of Federalism Are Not Implicated Here.

The Federal Government itself, through the Immigration and Naturalization Service ("INS"), requires use of the English language as a condition of naturalization. The State of Alabama can plainly require, as a condition of a state-conferred privilege, what the Federal Government itself requires. Issues of federalism and State determinations of language are thus not at issue here and are best left for a different case.

1. *The Federal Government Itself Requires English Proficiency as a Condition of Naturalization.*

As a condition of naturalization in the United States, the law requires the ability to read, write and speak simple words in ordinary usage in the English language, such as:

America is the land of freedom.
All United States citizens have the right to vote.
I want to become an American so I can vote.
It is important for all citizens to vote.
Many people come to America for freedom.
Many people have died for freedom.
Only Congress can declare war.
The people in the class took a citizenship test.

The President must be born in the United States.
The Statue of Liberty was a gift from France.
The stripes of the American flag are red and white.

Sample Sentences For Written English Testing, Immigration & Naturalization Service, INS Online, http://www.-ins.usdoj.gov/graphics/services/natz/natzsamp.htm (last modified Aug. 16, 2000).

Some of the potential INS questions even relate to cars: "I count the cars as they pass by the office. I drive a blue car to work. My car does not work." *Id.* Alabama can require for driver's licenses what the Federal Government already requires for naturalization. The level of difficulty of the Alabama driver's license test is no greater than that of the INS naturalization test.

2. *Issues of Federalism are Not Implicated Here.*

Federalism with respect to selection of official languages is not at issue here. As demonstrated in Part II below, principles of federalism may not allow a State to select a language other than English as its official language. For example, the Constitution imposes limits on the power of State courts to conduct proceedings or issue opinions in languages not understood by the public. *See* U.S. Const. Amend. V (guaranteeing the right to a public trial).

This case merely concerns whether a State must allow exceptions to a generally applicable law mandating use of English in government operations. As shown above, exceptions for language to a generally applicable licensing law are not required.

E. English Is Becoming the Language of the 21st Century.

Language is a means for communicating ideas, and its efficacy depends on the medium of communication as well as the idea to be communicated. An ancient pictorial language developed in the Himalayas, for example, is unlikely to be efficient in communicating over the internet. Languages using large alphabets are less advantageous for the internet than a language having an alphabet of only 26 characters. Similarly, a language relying on subtle changes in intonation of identical words in order to convey wholly different meanings is at a disadvantage in static-plagued wireless communication. Modern technology does not treat all languages equally, because the inherent structure of certain languages is better suited to certain new technologies.

English has some accidental advantages. English has the smallest alphabet of major languages, including its lack of accented, hybrid, and pictograph characters. This facilitates efficient typing, the method for communicating over the internet, and allows use of the most basic character sets. English also features easy interchangeability of nouns, verbs, and adjectives, without much variance in form for pronouns and verbs. That promotes easy communication through brief, cryptic messages, the style preferred by electronic media.

English also features a powerful pipe-like quality, such that one phrase can be cut and pasted to another phrase with ease. Foreign phrases or terms can be inserted at will into English sentences, and the English language has grown enormously from its flexibility in incorporating words and phrases from other languages. Computer-based cutting and pasting text works more efficiently in English than in many other languages, such as those using pictorial characters. This is largely happenstance, but nevertheless gives English an advantage in the internet medium. Accordingly, English has

exploded in worldwide popularity since the advent of the internet, and about 80% of the internet uses English. English is now the second most widely spoken language in the world, with only Chinese dialects spoken by more people. English is overwhelmingly the second language of choice for non-English-speaking people. *See* Barbara Wallraff, *"What Global Language?"* 286 Atlantic Monthly No. 5, at 52 (Nov. 2000) (noting, *inter alia*, that "English is the working language of the Asian trade group ASEAN" and is also "the official language of the European Central Bank").

Some languages are easier to learn than others. To a native English speaker, Spanish and French are easier to learn than Arabic or Chinese. To non-English speakers, rudimentary English is easy to learn because of its absence of genders, cases and tones (pitches), as well as its very simple verb conjugation. Learning basic English is often little more than memorizing a limited number of words.

In multilingual continental Europe, a fierce battle over language popularity appears to be ending with English emerging as the standard for the 21st century. "After trying for decades to persuade more Britons to learn their language, the Germans have given up the struggle. Instead, they are promoting English as the language of the 21st century, with lessons for children as young as six." Toby Helm, *"English is Language of Today, Germans Admit"*, London Telegraph, Apr. 6, 2000. Germany's leading newspaper, the Frankfurter Allgemeine Zeitung, now produces an eight-page English edition. That German paper declares that "English is going to be the lingua franca of the next century." *Id.* (quotations omitted). Switzerland has German, French, and Italian for its official languages, but it has recently embraced English to be taught as the second language of choice, rather than its official languages. Fiona Fleck, *"Swiss Want English as Second Language"*, London Telegraph, Oct. 29, 2000.

English improves by borrowing the best from the competition. The powerful diplomatic concept of "détente" was expressed better in French than English, so English adopted the French term. Latin often does a better job with legal and religious concepts, such as "caveat emptor" and "fiat lux," so English imported those as well. Italian is still the best for operas!

In the apolitical world of computer programming, the objective differences in programming languages are indisputable. FORTRAN has inherent advantages for doing complex calculations; LISP is superior for manipulating strings; PERL is superior for facilitating ease-of-programming; and C++ is superior for writing operating systems. Both programming languages and communicative languages consist of syntactical rules and defined terms, and the efficiency of those rules and terms depend on the subject matter and circumstances. No one would claim that the COBOL programming language is equal to these other languages, even though in theory it can be used to perform the same functions. While all men are created equal, all languages are not.

Depending on history, technology and circumstance, languages are far from equal in a given situation. Alabama police officers who pull over cars at 2 a.m. can carry out their duties better if the drivers speak at least rudimentary English. Likewise, Alabama police officers can take clearer statements after car accidents from witnesses who speak English. Alabama has the authority to require this of its drivers. The increasing use of wireless phones and even the internet in automobiles creates additional reasons to require basic English skills for Alabama drivers. Alabama's requirement of basic English skills as a prerequisite for obtaining a driver's license is thoroughly justified.

II. Neither the Constitution – Written and Applied in English—Nor Its Implementation Can Require Official Use of Any Language Other than English

The U.S. Constitution is written and implemented in English, and there is no official version in any other language. Therefore it cannot require official use of any language other than English. Title VI of the Civil Rights Act of 1964 implements the Fourteenth Amendment, and thus similarly cannot require use of any language other than English.

Our Rule of Law is based on more than 200 years of development of an enormous body of law in one language: English. Common law in the United States is built on 500 years of jurisprudence in one language: English. All major legal materials are in English, including the Declaration of Independence, the Constitution, the Federalist Papers, Presidential speeches and Congressional debates. All statutes are in English. All judicial decisions are in English. This enormous body of law cannot be translated precisely into another language without altering, even if slightly, the constitutional principles themselves. It is inconsistent with the Constitution for regions of the United States to begin mandating official languages other than English.

The vision of the Constitution is inseparable from its language. James Wilson, the only member of the Pennsylvania Ratifying Convention who had a seat at the Federal Convention, said the following in his summation at the Pennsylvania Ratifying Convention:

> As we shall become a nation, I trust that we shall also form a national character; and that this character will be adapted to the principles and genius of our system of government, as yet we possess none – our language, manners, customs, habits, and dress, depend too much upon those of other countries. Every nation in these respects should possess originality, there are

not on any part of the globe finer qualities, for forming a national character, than those possessed by the children of America. ... [In addition to a respectable national character,] I think there is strong reason to believe, that America may take the lead in literary improvements and national importance. This is a subject, which I confess, I have spent much pleasing time in considering. **That language, sir, which shall become most generally known in the civilized world, will impart great importance over the nation that shall use it. The language of the United States will, in future times, be diffused over a greater extent of country, than any other that we now know.** The French, indeed, have made laudable attempts toward establishing an [sic] universal language, but, beyond the boundaries of France, even the French language is not spoken by one in a thousand. Besides, the freedom of our country, the great improvements she has made and will make in the science of government, will induce the patriots and literati of every nation to read and understand our writings on that subject, and hence it is not improbable that she will take the lead in political knowledge.

James Wilson, *Summation Address to the Pennsylvania Ratifying Convention* (Dec. 11, 1787), *reprinted in The Debate On The Constitution – Federalist and Antifederalist Speeches, Articles, and Letters During The Struggle Over Ratification* 865-66 (Gryphon Eds. 1993) (emphasis added).

A. States Cannot Be Required to Depart from English in Their Official Documents.

Congress can no more require States to depart from English in official documents than Congress could draft an official Constitution or Declaration of Independence translated into a different language. States joined the Union based on a one-

language legal system, and States have the authority to adhere completely to that language in their official documents.

In contrast to other countries, the United States is governed by a written Rule of Law – defined and applied in English. Such terms as "freedom of speech," "due process of law," "high crimes and misdemeanors," and "common law" lack precise translations in other languages. Translation of the Constitution, or the enormous body of Supreme Court decisions construing it, into another language would create endless uncertainties and opportunities for alteration inherent in the translation process. *See, e.g.*, George Steiner, *After Babel: Aspects of Language and Translation* 428 (3d ed. 1998) (noting the impossibility of perfect translation).

Congress cannot circumvent the amendment process by promulgating the Constitution in a different language. Nor can Congress require States to depart from English in their laws and regulations. Requiring that driver's license tests be provided in languages other than English presumes the authority to require States to provide official non-English translations of the laws on which those tests are based. Congress lacks this authority to require States to depart from English.

Congress could not, for example, require through legislation that the Supreme Court begin promulgating official non-English translations of its opinions. Creating multiple translations of the same opinion would create multiple and divergent versions of the law itself. As observed by Professor Edward Sapir of the University of Chicago and later of Yale University, "No two languages are ever sufficiently similar to be considered as representing the same social reality." *See id.* at 91 (quoting D. Mandelbaum (ed.), *Selected Writings in Language, Culture and Personality by Edward Sapir* (1949)). This theory – that people who speak different languages perceive the world quite differently – became known prominently as the Sapir-Whorf hypothesis.

Our view towards individual rights and privileges is shaped by the language in which those rights and privileges are defined.

If multilingual official versions of statutes, regulations, or judicial opinions were promulgated, different lines of precedent could develop depending on which language was preferred by a judge. English common law itself implicitly presumes a single language, so that a consistent body of case law may be developed. Requiring Alabama to translate official licensing tests into other languages will inevitably result in requiring Alabama to translate statutes and judicial opinions upon which the tests are based into other languages as well.

"Government of the people, by the people, and for the people" ensures that the people have the power to require that the government speak in a common language. The people of Alabama have the authority to require that its statutes be in English – the language of the Constitution – and the people of Alabama have the authority to implement those statutes in English for official documents such as licensing tests. "We must have but one flag. We must also have but one language. That must be the language of the Declaration of Independence, of Washington's Farewell address, of Lincoln's Gettysburg speech and second inaugural. We cannot tolerate any attempt to oppose or supplant the language and culture that has come down to us from the builders of this Republic." Theodore Roosevelt, *"The Children of the Crucible"*, 14 Annals of America 1916-1928, 129, at 130 (1968).

B. Basic Constitutional Rights are Premised on One Common Language.

Out of many, one: **E Pluribus Unum**. For over two hundred years, America has been a country of one, including one common language. Many constitutional rights are built on the premise that the public understands one common

language. The right to a public trial requires that the public understand the language spoken at the trial. The right to petition the government assumes that the government and the public speak a common language. The right to see a warrant prior to allowing a search and seizure assumes that the recipient can understand the language of the agent presenting the warrant. The right to a reasoned judicial decision in court proceedings assumes that the decision is written in a language that the litigants understand.

The Constitution, including the Bill of Rights, was adopted on the assumption that there would be one language that is common to both the government and to the people. The Constitution implicitly disfavors language bifurcation that could frustrate constitutional rights to a public trial, petitioning of the government, warrants for searches and seizures, reasoned judicial opinions, and many other rights.

The court below erroneously assumed that requiring English on state licensing exams is detrimental to applicants. *See* 197 F.3d at 508 ("[T]he inability to drive a car adversely affects individuals in the form of lost economic opportunities, social services, and other quality of life pursuits."). This fails to consider the enormous offsetting economic benefits available to those who are encouraged to learn English, whether through a driver's license requirement or otherwise. While English requirements have a disparate adverse impact on those who refuse to learn rudimentary English, they have an enormously positive impact on those who comply with the requirements and then are able to enter the mainstream of American academic and economic life. *Cf. Lau v. Nichols*, 414 U.S. 563, 565 (1974) ("Teaching English to the students of Chinese ancestry who do not speak the language is one choice.").

Moreover, Alabama itself will be severely disadvantaged if all its services must be provided in languages other than English. Increasingly, Alabama needs to use new

technologies, such as web pages and wireless services, to interact with the public. For example, Alabama will inevitably develop a system for filing state tax returns online. If this court requires Alabama to simultaneously offer such services in other languages as well as English, then the state will be greatly hindered and all Alabamians will suffer. Alabama should be able to use language standards as well as technology standards in order to operate efficiently. Alabama must retain authority to publish and use standard forms, interfaces and licenses in the language of our national government: English.

C. Neither Congress Nor the Individual States Have the Authority to Establish an Official Language Other Than English.

Although a few States have accepted official use of multiple languages for some purposes, precise translation of the Constitution into a different language is not feasible. As the Spanish philosopher put it, "An idea does not pass from one language to another without change." Miguel de Unamuno, *The Tragic Sense of Life*, Author's Preface, xxxiii (J.E. Crawford Flitch transl. 1921).

Constitutional terms such as "due process of law" and "common law" lack precise equivalents in other languages. Other constitutional law terms such as "freedom of speech," "cruel and unusual punishments," and "involuntary servitude" likewise lack identical counterparts in other languages. *See* Gregory Rabassa, *"No Two Snowflakes are Alike: Translation as Metaphor"* at 1, *reprinted in* John Biguenet and Rainer Schulte, *The Craft of Translation* 1 (1989) ("[W]e should certainly not expect that a word in one language will find its equal in another."). Even a familiar phrase like "the American dream" encounters thorny problems of translation to other languages used in the Americas, where "America" does not mean the "United States." Translating key terms of

the Constitution would modify them without complying with the amendment process. Moreover, translating the 200-plus years of judicial interpretations into a different language would change their meaning. Imagine the Supreme Court being required to review lower court opinions written in a different language. That would introduce substantial translation complexities – and interference with the judicial process.

Creating an official language other than English would require translating the Constitution – and would effectively modify it without complying with its requirements for amendment. *See id.* ("[A] translation can never equal the original ...."). Neither Congress nor the individual States have this authority to modify the Constitution through translation. The Constitution can be modified only through the amendment or convention processes specified therein.

D. The Constitution Disfavors Language Balkanization.

It is axiomatic that statutory interpretation should avoid constitutional difficulties. *See, e.g., Machinists v. Street*, 367 U.S. 740, 749-750 (1961) ("Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). This applies to Title VI of the Civil Rights Act of 1964 as forcefully as to any other Congressional statute. The interpretation of this statute by the court below must be reversed because it creates constitutional difficulties.

History provides many examples of how language separation leads to conflict, division, demands for separate

government, and even secession. As Abraham Lincoln put it in his famous speech to the Republican Illinois State Convention in 1858, "'A house divided against itself cannot stand.'" Roy A. Basler, 2 *Collected Works of Abraham Lincoln* 461 (1953) (quoting *Matthew* 12:25). Although Lincoln was speaking about slavery, this eternal principle holds true for language. The promotion of language balkanization leads to political separatism.

A chilling illustration of this is unfolding in nearby Quebec, Canada. Language division has led to a movement for secession by the French-speaking Quebec residents from primarily English-speaking Canada. After losing by a substantial margin in 1980, the secession movement continued to grow and nearly succeeded in its second referendum in 1995 when, by a margin of only 50.6 to 49.4 percent, voters narrowly rejected the secession of Quebec from Canada. This secession issue, driven by language differences, has disrupted Canadian politics and caused violence and economic dislocation.

1. *The Decision Below Would Promote Language Balkanization of Municipalities*

The decision below effectively deprives States of their power to require an official State language for official duties. Under the decision, each municipality could establish the language for its official business. Political elections in many regions of the country could soon be determined based on which candidate supports official use of languages other than English.

This local problem is illustrated by the Quebec secession movement. "Several municipalities have held referendums asking their constituents whether, in case of Quebec's secession, they would want to stay within an independent Quebec or would prefer to remain within Canada through a partitionist process. They have usually obtained huge

majorities in favor of the latter." Francois Crepeau, *"The Law of Quebec's Secession"*, 27 American Review of Canadian Studies 27-50 (Sept. 1997). After all, "if a part of Canada (namely Quebec) can secede, then a part of Quebec can too." *Id.* Voters inevitably want a government that speaks in their language.

If the State of Alabama cannot mandate English for its licensing tests, then it surely cannot mandate the use of English for municipal business either. Once the principle of "one country, one official language" is abandoned, as it was in the decision below, the inevitable result will be countless language and sovereignty controversies at the local level. "[T]he [prior] conception [was] Canada is one country and only the Canadian people taken as a whole have a right to self-determination, to the exclusion of any of its alleged components: au contraire, if parts of the Canadian people may lay claim to self-determination, then other parts can too, including parts of the parts." *Id.*

As Representative Bob Goodlatte of Virginia observed, "Consider this: 40 million Americans will be non-English language proficient by the year 2000." Cong. Rec. H9741 (Aug. 1, 1996). If States cannot mandate a single official language for State documents and tests, then language balkanization of America may become inevitable.

2. *Prior Economic Forces Preventing Balkanization Have Diminished, Leaving Language as the Main Catalyst*

In our nation's struggle to avoid secession, moral opposition to slavery was supplemented by powerful unifying economic forces. In Abraham Lincoln's annual address of 1862, he declared that the United States could not be broken up because it formed an indivisible economic unit, and that only its economic unity provided prosperity. Gabor S. Boritt, *Lincoln and the Economics of the American Dream* 234

(1994). Lincoln observed that, even if the United States did disintegrate over slavery, economic incentives "would, ere long, force reunion, however much of blood and treasure the separation might have cost." Roy A. Basler, 3 *Collected Works of Abraham Lincoln* 17-18, 88, 120-21 (1953-55). Earlier, Lincoln had stated the economic case against secession as follows:

> On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men - to lift artificial weights from all shoulders - to clear the path of laudable pursuit for all -to afford all, in unfettered start, and a fair chance, in the race for life.

Roy A. Basler, 4 *Collected Works of Abraham Lincoln* 438 (1953-55).

These economic incentives for political unity, however, are now diminished in favor of a global economy and electronic commerce. Protective tariffs have been much reduced by international agreements and the "euro" is replacing national European currencies. There may be less economic reason to stay together any more. Powerful emotional and legal benefits for pockets of voters to have a government that speaks their language could now outweigh economic considerations.

As Winston Churchill observed, "This gift of a common tongue is a priceless inheritance." Winston Churchill, Speech at Harvard University (Sept. 5, 1943). The State of Alabama has a compelling interest in preserving that gift for future generations, including its requirement of English for its drivers' license tests.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 2000

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JAMES ALEXANDER, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, AND THE ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE[1]

The interest of *Amicus Curiae* National Association of Manufacturers arises from the far-reaching consequences of any decision regarding a private right of action based on Title VI "disparate impact" regulations issued by federal funding agencies. *Amicus Curiae* is particularly concerned about "disparate impact" claims in the context of environmental permitting decisions made by state agencies.

Just two years ago, the Court considered the same question presented in this case, but in the context of a "disparate impact" challenge to an environmental permit issued by the Pennsylvania Department of Environmental Protection. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 118 S. Ct. 2296, *vacated as moot*, 524 U.S. 974 (1998). Although the factual context of the present case is plainly different,[2] the concerns exemplified by the *Chester Residents* case are just as pressing today as they were two years ago. As set forth below, those concerns warrant very careful consideration in reaching any conclusion about private rights of action under Title VI "disparate impact" regulations.

The National Association of Manufacturers is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

[2] *Amicus Curiae* takes no position on Alabama's English-only drivers license testing policy.

of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The decision of the court of appeals adversely affects the ability of members of *Amicus Curiae* to obtain needed permits under key federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act (RCRA). These statutes require most major manufacturing facilities to obtain one or more environmental permits, which typically expire unless renewed every few years. Significant changes to the manufacturing facilities, in turn, typically require either new permits, or modifications to existing permits, before the changes may be put into effect.

These federal statutes ultimately delegate to state or local permitting agencies the authority to issue all or most environmental permits. However, the Eleventh Circuit's decision, by concluding that there is a private right of action in federal court based on "disparate impact" regulations under section 602 of the Civil Rights Act of 1964, interjects into the states' established permitting processes a wholly new set of issues.

Specifically, the decision below opens environmental permits to collateral attacks in federal court on the ground that they may have a "disparate impact" on a racial or ethnic group, based on criteria that are not clearly delineated, understood, or agreed upon. In the *Chester Residents* case, for example, the claim was that the Pennsylvania Department of Environmental Protection violated EPA's Title VI regulations by issuing a permit for a facility in an area with a higher percentage of minority residents than the percentage found in the county as a

whole.[3] The alleged violation was not the environmental performance of the facility, but rather its proximity to minority residents.

The uncertainty and delay in the permitting process caused by these "disparate impact" challenges will make it extremely difficult for companies to make essential planning decisions and will prevent or discourage the companies from obtaining permits necessary to modernize existing facilities in a timely manner, to construct new facilities, or even to continue operation of existing facilities. Local communities, as a result, may suffer increased pollution, loss of jobs, and a reduced tax base.

Amicus Curiae National Association of Manufacturers is committed to federal, state, and local environmental permitting programs that provide meaningful opportunities for community involvement and input. It believes that environmental permits should protect public health and the environment and that permits not meeting the relevant criteria should not be issued. However, the decision of the court of appeals will not result in more protective permits or foster greater compliance. Instead, it will cause significant uncertainty to be overlaid on the existing permitting processes, thereby undermining the environmental protection goals of the programs and making it more difficult for facilities to make beneficial changes.

STATEMENT OF THE CASE

Amicus Curiae National Association of Manufacturers adopts the statement of the case contained in the brief of Petitioners, as supplemented by the following summary.

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[3] Michael Mattheisen, *The U.S. Environmental Protection Agency's New Environmental Civil Rights Policy*, 18 Va. Env'tl L.J. 183, 199-206 (1999).

In the decision below, the Eleventh Circuit ruled that private parties can bring actions in federal court based on "disparate impact" regulations issued by federal agencies under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d - 2000d-7 (1994). Section 602 of Title VI, 42 U.S.C. § 2000d-1, provides that federal agencies are to promulgate regulations denying federal financial assistance to recipients who discriminate against persons on the basis of "race, color, or national origin."

The Title VI "disparate impact" regulations issued by many federal agencies state, in relevant part, that the agencies will withhold federal financial assistance if they find that the recipient is using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination" based on race, color, or national origin. In *Chester Residents, supra*, the private right of action was based on the regulations issued by the Environmental Protection Agency (EPA). 40 C.F.R. § 7.35(b). In this case, the private right of action was based on the regulations issued by the Department of Transportation. 49 C.F.R. § 21.5(b)(2). The relevant language in both sets of regulations is virtually identical.

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision, unless reversed, will have a profoundly adverse impact on permitting programs established by the federal environmental statutes and administered primarily by state regulatory agencies. The conclusion that parties can challenge state permitting decisions implementing federal environmental programs on "disparate impact" grounds makes the process of obtaining valid environmental permits substantially more difficult for reasons

unrelated to protecting human health and the environment. It will also introduce tremendous amounts of uncertainty and delay into the overall permitting process. Moreover, it will likely burden the federal courts with a vast number of challenges to such state permitting decisions.

To illustrate the potential impact of the Eleventh Circuit's reasoning, this brief focuses on two related permitting programs administered primarily by the states under one of the major federal environmental statutes – the Clean Air Act. These two programs govern the activities of a broad range of industrial facilities throughout the country, and the ability of companies to obtain permits under the programs in a reasonable manner is vital to the continued operation of those facilities. Both programs impose stringent pollution control requirements on applicants seeking permits and involve detailed permitting procedures, including extensive opportunities for public participation. However, the Eleventh Circuit's decision will wreak havoc on these Clean Air Act permitting programs by allowing parties to bring federal court challenges to final state permitting decisions on ill-defined "disparate impact" grounds.

Although permitting requirements under the various Clean Air Act programs are by now generally well understood and predictable, the Eleventh Circuit's decision would inject a great deal of uncertainty into these permitting programs. Because of the nature and variety of the claims that might later be raised, neither the permit applicant nor the state permitting authority could anticipate what showing must be made by the applicant to avoid having the final permit subsequently overturned by a federal court for causing a "disparate impact" on a particular group.

Ironically, Title VI "disparate impact" claims such as these will frequently harm the minority communities that the

proponents of the claims seek to benefit. Judicial actions based on such "disparate impact" claims will make it impossible or extremely difficult for companies to obtain, in a timely fashion, final environmental permits that can be relied upon. This will cripple the ability of a company to make the essential planning and investment decisions necessary to modernize existing facilities, or to construct newer and cleaner facilities near minority communities. As a consequence, such claims – or the threat of such claims – will eliminate jobs in the local community, lower the local tax base, and in many instances actually cause greater pollution in the area in question.

ARGUMENT

THE DECISION BELOW SERIOUSLY INTERFERES WITH STATE ENVIRONMENTAL PERMITTING PROGRAMS AND UNDERMINES THE GOALS OF THOSE PROGRAMS.

The Clean Air Act establishes two principal permitting programs that are generally applicable to stationary sources of air emissions: a preconstruction permit program under the New Source Review (NSR) provisions of the Act (42 U.S.C. §§ 7470-7515) and an operating permit program under Title V of the Act (42 U.S.C. §§ 7661-7661f). Among other things, the NSR program requires sources planning to undertake significant physical or operational changes in existing facilities to install more stringent pollution controls. The Title V program is primarily intended to incorporate all applicable clean air requirements governing the operation of a major source in one permit so that the permittee, the permitting authority, and the public will have a clearer understanding of the source's compliance obligations. Both permitting programs require sources seeking permits to comply with detailed, demanding requirements and to participate in extensive, time-consuming

permit proceedings. The programs also have an extremely broad reach – thousands of emissions sources across the nation must obtain permits under one or both programs, and those sources obtaining Title V operating permits must renew them every five years.

As currently constituted, the two permitting programs are relatively stable programs. They produce reasonably predictable results that protect human health and the environment. Permit applicants are ordinarily aware of the procedural and substantive requirements they must meet to secure a usable permit and are able to make key business decisions well in advance.

However, the Eleventh Circuit's decision, by allowing parties to raise "disparate impact" issues in federal court after a state permit has been issued, would severely disrupt the two permitting programs by causing an intolerable amount of uncertainty and delay. The vague and fluid nature of "disparate impact" claims will make it impossible for the permit recipient or the permitting authority to anticipate what claims could conceivably be raised. Because a final permit could later be challenged and overturned at some indefinite time for reasons unrelated to meeting environmental standards and protecting public health, the permit recipient cannot reasonably rely on that final permit.

As discussed below, these elements of uncertainty and delay will severely interfere with the ability of companies to obtain environmental permits critical to modernizing aging facilities and/or making changes necessary to respond to rapidly changing market demands. A company cannot reasonably make the investment and planning decisions necessary to proceed with a project if a final permit can later be collaterally attacked on "disparate impact" grounds under Title VI regulations – with

no clear indication of what issues might be raised or how long the litigation might last.

Finally, the fact that the Eleventh Circuit's decision will make it much more difficult for companies to obtain Clean Air Act permits will adversely affect the minority communities located near the facilities in question. If a plant is unable to modernize and remain competitive, it will ultimately provide fewer jobs and perhaps close altogether. The result will be abandoned industrial sites and economic harm to the minority community.

A. Current Clean Air Act Permitting Programs Require Facilities to Meet Stringent Requirements Designed to Reduce Emissions and Protect Public Health.

Both the NSR and Title V permitting programs reflect a regulatory approach based on principles of federalism. The statute provides that EPA is to delegate to state or local permitting agencies the authority to issue permits under the programs once the permitting agency has satisfied detailed requirements for establishing permit programs. Thus, in states or localities with approved programs, the state or local permitting authority is responsible for granting or denying permit applications, and judicial review of such decisions must be sought in state courts, not federal courts.

These state and local permitting agencies typically receive federal funds from EPA to assist them in implementing the Clean Air Act, including the Prevention of Significant Deterioration ("PSD") and Title V permitting programs. As a result, the Eleventh Circuit's decision would presumably allow parties to bring federal court "disparate impact" challenges to state or local permitting decisions made under those programs. *See generally Chester Residents, supra.*

Amicus Curiae briefly describes the permitting programs below and then discusses the adverse impacts that the Eleventh Circuit's decision would have upon them. It is important to recognize that the Clean Air Act permitting programs are discussed as examples of the wide range of federal and state permitting programs that will be disrupted by the Eleventh Circuit's decision. Similar serious problems will arise in permitting programs under the Clean Water Act, RCRA, and other environmental programs involving permit requirements. Furthermore, the Eleventh Circuit's decision would extend even beyond these fundamental permitting programs and interfere with federal, state, and local government efforts to revitalize urban areas by locating new industrial facilities on previously contaminated waste sites that have been cleaned up.

1. *The NSR Permitting Program*

Under the Clean Air Act, companies that seek to make changes at existing facilities or to construct new facilities may trigger NSR requirements under Parts C or D of Title I of the Act. 42 U.S.C. §§ 7470-7515. The question of whether a particular project will trigger NSR requirements depends on (1) whether the facility in question constitutes a "major stationary source"[4] and (2) whether the project will cause an emissions increase for a pollutant in excess of specified threshold levels. If a proposed project is determined to be subject to NSR, the company must obtain a preconstruction permit before undertaking the project.

The type of NSR permit required depends on whether or not the facility is located in an area which meets the national

[4] The terms "major emitting facility" and "major stationary source" are generally used interchangeably in the NSR program. The term "major stationary source" is defined at 40 C.F.R. § 51.166(b)(1)(I).

ambient air quality standard ("NAAQS") for the pollutant in question. Such standards, which are promulgated by EPA pursuant to section 109(b) of the Act, 42 U.S.C. § 7409(b), are designed to protect the public health and welfare in the area in question. For emissions sources located in "attainment areas,"[5] the preconstruction permit is referred to as a Prevention of Significant Deterioration ("PSD") permit. *See* sections 161 and 165(a)(1) of the Clean Air Act, 42 U.S.C. §§ 7471, 7475(a)(1). The principal purpose of the PSD permitting program is to ensure that attainment areas remain in compliance with the relevant NAAQS and that the existing clean air is not gradually degraded through increased pollution.

The states are primarily responsible for implementing the PSD permitting program. Sections 161 and 165(a) of the Act provide that each state is to include provisions in its State Implementation Plan ("SIP")[6] that will ensure that the PSD program is carried out. 42 U.S.C. §§ 7471, 7475(a). EPA administers the PSD program within a state only if that portion of the state's SIP is not approvable. 40 C.F.R. § 52.21(a).

To obtain a PSD permit, an applicant must satisfy a number of demanding, highly technical requirements. Among other things, the applicant must (1) demonstrate that emissions from the facility will not cause, or contribute to, pollution in excess of the NAAQS or any other emissions standard under the Act; (2) conduct and submit an extensive air quality impact analysis

[5] An "attainment area" is "any area . . . that meets the primary or secondary ambient air quality standard for the pollutant" in question. Section 107(d)(1)(A)(ii), 42 U.S.C. § 7407(d)(1)(A)(ii).

[6] Pursuant to section 110 of the Act, each state is to adopt and submit to EPA a plan which provides for the implementation, maintenance, and enforcement of the NAAQS for each pollutant in every region in the state. 42 U.S.C. § 7410.

for the area in question;[7] and (3) conduct monitoring to determine the effect which emissions from the facility may have on air quality in any area which may be affected by those emissions. *See generally* section 165(a).

Each proposed PSD permit is subject to an array of procedural requirements, including extensive public participation and comment requirements, before the state permitting authority may make a final decision granting or denying the permit. Among other things, the permitting authority must hold a "public hearing . . . with [an] opportunity for interested persons including representatives of the [EPA] Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." Section 165(a)(2).

Moreover, each final PSD permit must contain stringent emissions control requirements. For a source subject to PSD require-meats, the permit must require the use of the Best

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[7] The air quality impact analysis referred to above must include

> an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this [Act] which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region.

Section 165(e)(3)(B).

Achievable Control Technology ("BACT"), which is defined, in relevant part, as

> an emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation under this [Act] emitted from or which results from any major-emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility . . . .

Section 169(3), 42 U.S.C. § 7479(3).

2. *The Title V Operating Permit Program*

In the Clean Air Act Amendments of 1990,[8] Congress created a comprehensive operating permit program in Title V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f. The primary purpose of that program is to require "major sources" for the first time to obtain federal operating permits that incorporate all existing Clean Air Act requirements applicable to each source. The Title V permit program is regarded as one of the most far-reaching and resource-intensive regulatory programs ever implemented by EPA under the Clean Air Act. EPA has estimated that 20,000 facilities throughout the nation will need to obtain Title V permits – many of which have not yet been issued.

In accordance with section 502 of the Act, state or local air agencies may obtain approval from EPA to administer the Title V program within their jurisdictions. 42 U.S.C. § 7661a. EPA

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[8] Pub. L. No. 101-549, 104 Stat. 2399.

has promulgated a detailed set of regulations in 40 C.F.R. Part 70 describing what permitting requirements and procedures state programs must contain. Upon EPA's approval of a proposed state program, the state is authorized to administer the Title V program in that state. At this point, virtually all states have had their Title V programs approved by EPA.

A source that is subject to the Title V program must submit a detailed permit application to the state permitting authority pursuant to section 503 of the Act. 42 U.S.C. § 7661b. Among other things, such applications must identify all relevant emissions units and all applicable requirements. At a large facility, there may be hundreds of individual emissions units and scores of requirements applicable to those units. Many Title V permit applications have been several inches thick.

Final Title V permits must set forth all applicable requirements as well as an array of inspection, entry, monitoring, compliance certification, recordkeeping, and reporting provisions. Section 504, 42 U.S.C. § 7661c. Title V permits must also be revised as necessary to reflect changes in the source's applicable requirements or other significant changes in status. For example, relevant applicable requirements contained in a PSD permit for a new project must also be incorporated in the source's Title V operating permit. In addition, all Title V permits expire after five years and must be renewed through new permit proceedings. Section 502(b)(5)(B), 42 U.S.C. § 7661a(b)(5)(B).

Each state's Title V program must provide for extensive public participation in the development of individual Title V permits. Section 502(b)(6) requires that state programs contain procedures for public notice and comment and an opportunity for a public hearing. 42 U.S.C. § 7661(b)(6). In addition, the

state program must provide for judicial review of final permitting decisions in state court. *Id.*

B. The Decision Below Substantially Increases the Uncertainty and Complexity of the Clean Air Act Permitting Programs.

The Eleventh Circuit's decision seriously disrupts the elaborate permitting processes under both the PSD and Title V programs by allowing challenges to final state permits in federal court on the ground that they may have a "disparate impact" on a particular racial or ethnic group. The claims raised in these judicial challenges would create a new set of issues that have little or nothing to do with whether the final permits meet all relevant Clean Air Act and state environmental requirements and will protect the public health. As discussed below, overlaying the existing permitting programs with an entirely separate, ill-defined set of issues would interfere with the effectiveness of those environmental protection programs and would likely have adverse consequences for the local communities involved.

The current PSD and Title V permitting processes already impose very demanding requirements on applicants, and the permit proceedings themselves are frequently very time-consuming. Permit applicants expend great sums of money to meet the detailed requirements for obtaining permits and to install the control measures necessary to ensure that permit terms will be met.[9] At the same time, permit applicants

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[9] Studies from the Bureau of the Census show that the chemical industry alone spent approximately $4.5 billion in 1994 in capital expenditures and operating costs to comply with federal and state pollution abatement requirements. These costs include only direct expenditures for pollution control and not the significant additional costs of obtaining permits. *U.S. Chemical Industry Handbook*, Chemical Manufacturers Association (1997),

generally understand what procedural and substantive steps they must take to obtain a permit and what criteria will be used to judge whether a permit should be issued. As a result, the outcome of the permit proceeding ordinarily is reasonably predictable, and applicants are able to develop plans and make investments based on their expectations.

However, the Eleventh Circuit's decision would create tremendous uncertainty as to what is required to obtain a permit that can be relied upon and would make the task of obtaining such a permit infinitely more difficult. A serious threshold problem is that the very concept of a "disparate impact" in this context is vaguely defined and almost completely open-ended. The Title VI regulations themselves, which would be the basis for the private right of action, provide no meaningful definitions.

The assumption apparently underlying such "disparate impact" claims is that facilities that give rise to pollution should be located so that all identifiable racial or ethnic groups are exposed more or less equally to the pollution. Accordingly, there are numerous theories and arguments that conceivably could be advanced as to why a permitting decision for a particular facility somehow creates a "disparate impact" with regard to a racial or ethnic group in a particular area.[10]

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p. 136.

[10] Claims based on alleged "disparate impacts" have recently been raised in many different situations. For example, a pollution reduction program developed by the South Coast Air Quality Management District in California has been judicially challenged by groups on "disparate impact" grounds. The goal of the program is to promote early retirement of heavily polluting automobiles by allowing businesses to pay into a fund that is used to buy old vehicles. However, the plaintiffs contend that the program has discriminatory effects because industrial plants located near minority communities would allegedly use credits generated from the program to

On a practical level, it would be almost impossible to anticipate what specific showing a permit applicant would be required to make so that its permit would survive a post-issuance "disparate impact" challenge. For example, it would be unclear what ZIP code, census tract, or other geographic area should be used as the basis for comparison; what constitutes the target population; what is the "appropriate" reference area; what are the numerical criteria for establishing a "disparate impact"; and, finally, whether any disparity reflects impermissible discrimination, on the one hand, or reflects permissible socioeconomic and other factors, on the other.[11] Rather than addressing environmental issues, the Title VI court challenge may focus on such matters as census data, statistical analyses, historical studies, zoning decisions, and growth and land use patterns. Even if a source attempted to anticipate the kind of showing it must make to prove a negative – to prove the absence of any "disparate impact" – the plaintiffs can simply adopt a different approach and then demand that the source refute the different approach. Moreover, given the lack of clear criteria for determining what constitutes a "disparate impact" in the context of environmental permitting, federal courts presented with such "disparate impact" claims will likely struggle to develop uniform guiding principles for addressing the claims.

The uncertainty and complexity which will be engendered by "disparate impact" issues will substantially delay the issuance of numerous Clean Air Act permits. Even when a

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increase their emissions. Marla Cone, *Civil Rights Suit Attacks Trade in Pollution Credits*, Los Angeles Times, July 23, 1997, at 1.

[11] *See generally Latimore v. Citibank Federal Savings Bank*, 151 F.3d 712, 713-15 (7th Cir. 1998) (describing origins, purposes, and limitations of disparate impact analysis).

permit has been issued, the filing of a subsequent "disparate impact" challenge in federal court – or the threat of such a challenge – would significantly delay the time when a permittee could actually rely on the permit in order to make necessary investment, production, and marketing decisions.

The problem of delay is particularly crucial with regard to many PSD permits and for requested revisions to Title V permits. Sources frequently need to obtain PSD permits or Title V permit revisions relatively quickly because they must make physical or operational changes to respond to rapidly changing market conditions and remain competitive. For example, a pharmaceutical company may need to change its production processes or install new equipment at a facility in order to rapidly meet the demand for a newly-approved, important drug. If the company is unable to secure the necessary permit or permit revision in a reasonably expeditious way and rely upon it to take action, the company will suffer economic harm and the benefits of the drug to consumers will be postponed indefinitely. The interjection of "disparate impact" issues in federal court litigation after the conclusion of state permit proceedings would have a crippling effect on the ability of sources to meet market demands in a timely manner or simply to modernize an aging facility.

Moreover, under the Eleventh Circuit's decision, any person can challenge, on "disparate impact" grounds, a source's Title V permit *renewal* (required every five years). The source would then be forced to defend its continuing operation of the facility even if no significant changes had been proposed and no environmental standards had ever been violated. Conceivably, the facility could be forced to cease operating based on "disparate impact" grounds even though it had operated in accordance with all environmental laws for years.

It is important to recognize that the plaintiffs in a "disparate impact" challenge would have every incentive to make the proceedings last as long as possible. The source cannot commence construction on a new project until it has received the necessary final permit or permit revision and cannot reasonably rely on a permit or permit revision if it has been – or could be – collaterally challenged on grounds that are distinct from the basis on which the permit was granted. The longer the entire process takes, the greater the negotiating leverage gained by the plaintiffs. Bluntly put, a plaintiff may be able to force the permittee or permitting authority to make "concessions" – perhaps not related to environmental concerns – even though the plaintiff's substantive position lacks any merit whatsoever.

C. The Resulting Disruption of Clean Air Act Permitting Processes Would Lead to Adverse Consequences for the Environment and Local Communities, as Well as for Sources Seeking Permits.

The disruptions in the Clean Air Act permitting processes caused by interjection of entirely separate "disparate impact" issues after permit issuance will also lead to many other adverse results. Indeed, "disparate impact" claims will actually be counterproductive in many instances by causing greater pollution and doing economic harm to local communities.

These adverse results follow primarily from the fact that "disparate impact" claims will make it much more difficult and time-consuming for sources to obtain PSD permits or Title V permit revisions in order to modernize their facilities or to respond quickly to market demands. The filing of a federal court challenge based on "disparate impact" claims may prevent a source from receiving a necessary permit or permit revision in a timely manner – or receiving it at all. Beyond that, the very real possibility that such a challenge could be brought even

though the source satisfies all applicable environmental requirements may be enough to discourage the source from making improvements and changes at the facility in question.

If a facility is unable to make changes because of uncertainty resulting from "disparate impact" claims, it will operate less efficiently and become less competitive. Indeed, if a company cannot make needed changes at a particular facility, e.g., changes enabling the company to produce a new product, the company will likely make those changes at another facility. If the company is unable to keep a particular facility operating efficiently because of the inability to make physical or operational changes, the company will likely be forced to close the facility and move its operations elsewhere. As a result, jobs would be lost in the local community and the industrial site would be abandoned. The local tax base would also be reduced, thereby making it more difficult to provide services to residents in the community.

Moreover, "disparate impact" challenges to PSD permits would in many instances actually prevent emissions reductions from being made at a facility. This result may come about for either or both of two reasons. First, PSD permitting requirements are frequently triggered under the applicable regulations even though the proposed change will not, in fact, cause a significant increase in *actual* emissions.[12] Second,

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[12] To determine whether a PSD permit is required for a proposed modification, EPA believes that the facility's pre-change *actual* emissions should be compared to its post-change *potential* emissions, regardless of whether the post-change actual emissions would even approach the theoretical potential emissions. In calculating potential emissions, EPA generally assumes that the source will be operating continuously at full capacity and that it will not be using the stringent control technology it would have to use if PSD applies. This "actual-to-potential" approach was addressed in *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989). There the court recognized that, under this approach, PSD requirements could be triggered even though actual emissions at a facility would be reduced by a new operational process. *Id.* at 293-94.

once the Act's PSD requirements are determined to apply, the source's later-issued PSD permit will require the use of BACT. This very stringent control technology requirement will result in actual emissions being substantially reduced – many times to levels lower than the pre-change levels. By making it much more difficult or even impossible for facilities to obtain PSD permits, challenges based on "disparate impact" grounds would destroy the environmental benefits to be gained by such permits.

In summary, under the approach taken in the Eleventh Circuit's decision, environmental permits issued by state agencies can be collaterally attacked in federal court even though the facilities satisfy all requirements for obtaining the permits, would comply with all environmental laws, and would, in fact, provide net environmental benefits. Because of the uncertainty and delay engendered by this approach, companies would be prevented or discouraged from modernizing their plants, and those plants would be unable to remain competitive in the marketplace. As a result, jobs would be lost in the affected communities. At the end of the day, everyone would lose – the local communities, the companies duly seeking environmental permits, and the state or local permitting authorities attempting to administer these programs.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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No. 99-1908

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IN THE

Supreme Court of the United States

NOV 13 2000

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, MANUFACTURERS ALLIANCE, AND U.S. REPS. ROBERT ADERHOLT, SPENCER BACHUS, SONNY CALLAHAN, TERRY EVERETT, AND BOB RILEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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38pp

QUESTION PRESENTED

Whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a State's violation of federal administrative regulations, issued pursuant to Section 602 of the Civil Rights Act of 1964, that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions.

Fairly encompassed within that question is the following subsidiary question:

Whether the U.S. Departments of Justice and Transportation exceeded the authority granted to them under Section 602 of the Civil Rights Act of 1964, when they adopted regulations that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a Washington, D.C.-based nonprofit public interest law firm with supporters in all 50 states, including Alabama.[1] WLF devotes a significant portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this and other federal courts in an effort to prevent unwarranted judicial expansion of federal civil rights laws. In particular, WLF has opposed attempts to incorporate "disparate impact" principles into cases decided under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* *See, e.g., Seif v. Chester Residents Concerned for Quality Living*, No. 97-1620, *cert. dismissed*, 524 U.S. 974 (1998); *Powell v. Ridge*, 187 F.3d 387 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999). WLF also filed a brief in support of the certiorari petition in this case.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Manufacturers Alliance is a non-profit research organization supported by more than 500 manufacturing companies from a broad range of industries. Its members range in size from relatively small, single-product manufacturers with annual sales revenues in the $30 million

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF, its supporters, and its counsel, made a monetary contribution to the preparation or submission of this brief.

to $100 million range to very large, highly diversified manufacturers with annual sales revenues exceeding $1 billion. Its mission is to assist its members in improving productivity by stimulating investment in technology and by encouraging innovations, thereby enhancing its members' worldwide competitiveness.

Reps. Robert B. Aderholt, Spencer Bachus, Sonny Callahan, Terry Everett, and Bob Riley are members of the U.S. House of Representatives from Alabama. They are participating in this case in order to ensure that laws adopted by Congress are interpreted in the manner intended by Congress, and not re-written in an overly-expansive manner by federal administrative agencies.

Amici are troubled by the broad scope of the decision below; they are concerned that it could result in judicial challenge to a broad range of facially neutral programs and policies administered by State actors and by private entities that receive federal funding. Indeed, numerous such challenges are pending.

Amici agree with Petitioners that the appeals court erred when it held that Congress intended to create a private right of action under regulations implementing Title VI of the Civil Rights Act of 1964 on behalf of individuals allegedly injured by policies that have a disparate impact on the basis of race, color, or national origin. No such right of action is set forth in the statute, and -- applying traditional rules of statutory construction -- there is no basis for inferring congressional intent to create such a right of action.

Amici write separately in order to emphasize an additional ground for concluding that Congress did not intend to

create a private right of action to enforce Title VI disparate impact regulations. In adopting Title VI (which proscribes intentional discrimination only), Congress never intended to permit federal agencies to promulgate Title VI regulations incorporating a disparate impact standard. Because the regulations purporting to adopt such a standard were not authorized by Congress, it could not have intended to create a private right of action on behalf of those alleging injury as a result of violation of those regulations.

Amici are filing this brief with the consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioner Alabama Department of Public Safety (the "Department") is charged with licensing motor vehicle drivers within Alabama. In 1991, the Department adopted a policy requiring all portions of the driver's license examination process to be administered in English.

Respondent Martha Sandoval filed suit against the policy in 1996, alleging that Alabama's English-only policy had a disparate impact on the foreign-born, who (Ms. Sandoval alleged) are more likely than U.S.-born residents to be unable to comprehend English. Ms. Sandoval alleged that the policy violated federal regulations designed to implement the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, *et seq*.[2]

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[2] Section 601 of Title VI, 42 U.S.C. § 2000d, provides:

(continued...)

Following a February 1998 trial, the district court granted the Department's motion for judgment as a matter of law on Ms. Sandoval's intentional discrimination claims. Pet. App. 64a. Ms. Sandoval has not appealed from that ruling. On June 3, 1998, the district court issued its opinion rendering judgment for Ms. Sandoval, based on a disparate impact standard. Pet. App. 58a-254a. The court found: (1) the federal regulations adopting a disparate impact standard were valid (*id.* at 74a n.11); (2) the Department was a recipient of federal funds within the meaning of Title VI (*id.* at 76a-82a); (3) Congress impliedly created a direct cause of action on behalf of those discriminated against in violation of the Title VI regulations (*id.* at 82a-117a); (4) Ms. Sandoval had standing (*id.* at 117a-125a); (5) the Eleventh Amendment did not bar Ms. Sandoval's claims for injunctive relief (*id.* at 125a-149a); (6) Alabama's English-only policy had a disparate impact on those born outside the United States (*id.* at 149a-205a); and (7) Alabama did not meet its burden of demonstrating that the English-only

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[2](...continued)
No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602, 42 U.S.C. § 2000d-1, authorizes federal agencies that provide financial assistance to issue "rules, regulations, or orders of general applicability" in order to "effectuate the provisions of section 601." The Title VI regulations invoked by Ms. Sandoval in support of her claim are 49 C.F.R. § 21.5(b)(2) (Department of Transportation) and 28 C.F.R. § 42.104(b)(2) (Department of Justice), which require recipients of federal funds to not "directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting [individuals] to discrimination on the basis of their race, color, or national origin." *See* Petition Appendix ("Pet. App.") 5a n2.

policy had a "substantial legitimate justification" (*id.* at 205a-246a). The court enjoined enforcement of the English-only policy and ordered the parties to meet in an effort to agree on a new policy. *Id.* at 252a-254a.

The Eleventh Circuit affirmed. *Id.* at 1a-57a. The appeals court upheld the validity of the Department of Transportation and Department of Justice Title VI regulations imposing a disparate impact standard, stating that this Court held in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), that federal agencies "have the authority to promulgate regulations under Section 602 that prohibit federal funding recipients from taking any action that *results* in a disparate impact or produces discriminatory *effects* on the basis of race, color, or national origin." Pet. App. 35a-36a (emphasis in original).[3]

The appeals court also found that Congress impliedly created a private right of action to enforce the disparate

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[3] The appeals court stated that the Department "concede[d] that these agency implementing regulations are valid exercises of agency authority under Section 2000d-1." *Id.* at 5a n.2. That statement is incorrect; the Department made no such concession. The Department's Eleventh Circuit brief merely recited what the various *Guardians* opinions said regarding the validity of the disparate impact regulations (Brief at 28), and then noted that later Supreme Court case law "rejected an attempt by private plaintiffs to assert a disparate impact claim under Title VI regulations." 11th Circuit Brief at 29 (citing *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992)). Furthermore, the appeals court recognized later in its opinion that the Department was, indeed, challenging the regulations, stating, "Appellants argue that the Supreme Court in *United States v. Fordice* overruled *Guardians*. . ." Pet App. 47a n.24.

impact regulations. *Id.* at 34a-48a.[4] The court based that finding primarily on its reading of this Court's opinions in *Guardians* and *Alexander v. Choate*, 469 U.S. 287 (1985).

Finally, the appeals court affirmed the trial court findings that the English-only rule had a disparate impact on foreign-borns and that the Department had failed to provide adequate justification for the rule. Pet. App. 48a-56a. Accordingly, the appeals court affirmed the trial court's grant of injunctive relief.

The Department's certiorari petition presented a single issue for review: whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a State's violation of federal Title VI regulations that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions. Fairly encompassed within that issue is the validity of those regulations -- because there can be no basis for inferring a congressional intent to create a private right of action to enforce disparate impact regulations if Congress never intended to permit such regulations.

SUMMARY OF ARGUMENT

The Question Presented in this case asks whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a

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[4] The appeals court did not consider whether 42 U.S.C. § 1983 created an *express* right of action to enforce the Title VI disparate impact regulations against State actors. The court stated that Ms. Sandoval had chosen not to assert a right of action under § 1983 but rather to rely solely "on Section 602 directly." *Id.* at 45a n.21.

federal fund recipient's violation of regulations issued pursuant to Title VI that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions. *Amici* fully support the Department's position that the answer is no -- Congress did not intend to create such a private right of action. But the principal reason why the answer most assuredly is "no" is that Congress never intended to grant federal agencies the authority to adopt such regulations in the first instance. It is uncontested that Congress intended that Title VI *not* apply in any instance in which there is no evidence of intentional discrimination. Given that intent, the disparate impact regulations must be invalid, because it cannot be the case that such regulations "effectuate" the provisions of Title VI (as is required of any regulation issued pursuant to § 602 of Title VI, 42 U.S.C. § 2000d-1). Accordingly, there is no private right of action to enforce the Title VI disparate impact regulations because Congress cannot, of course, have intended to create a private right of action to enforce invalid regulations.

The validity of the disparate impact regulations is properly before the Court because that issue is "fairly embraced" within the Question Presented. Moreover, their validity was addressed by both the district court and the court of appeals.

The Eleventh Circuit and numerous other lower federal courts have wrongly interpreted this Court's decisions in *Guardians* and *Alexander* as holding that agency regulations under Title VI that incorporate a disparate impact standard are valid -- when, in fact, this Court has never decided the question. Most recently, in *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), the Court indicated that agency regulations under Title VI did *not* extend beyond the

protection provided by the Fourteenth Amendment, but the Eleventh Circuit ignored *Fordice*'s admonition under the mistaken belief that the Court had settled the issue in *Guardians* and *Alexander*.

Both the language and legislative history of Title VI indicate that Congress did not authorize federal agencies to adopt disparate impact regulations. Moreover, a decision upholding the disparate impact regulations could disrupt a wide range of commonly accepted government activities. It could even undermine the essential purpose of Title VI -- eliminating *intentional* discrimination on the basis of race, color, or national origin -- by inducing federal fund recipients surreptitiously to engage in intentional discrimination in order to avoid the types of racial or ethnic imbalance that can give rise to disparate impact lawsuits.

I. THE ISSUE OF WHETHER FEDERAL AGENCIES EXCEEDED THEIR AUTHORITY BY ADOPTING REGULATIONS THAT PURPORT TO INCORPORATE A DISPARATE IMPACT STANDARD IS PROPERLY BEFORE THE COURT

The Court long ago established that Congress impliedly intended to create a right of action by individuals claiming to have been injured by a federal fund recipient's violation of the substantive provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *See, e.g., Cannon v. University of Chicago,* 441 U.S. 677 (1979). Thus, if regulations adopted by federal agencies did nothing more than flesh out the contours of those substantive provisions, the issue whether Congress intended to create a private right of action for violation of those regulations would never arise. Any suit to enforce such regulations would, in

essence, be a suit to enforce the substantive provisions of Title VI, and the propriety of such suits is well established.

The private right of action question arises here solely because federal agencies have adopted Title VI regulations whose substantive provisions are materially different from those of Title VI itself. The Court has repeatedly stated that Title VI extends no farther than the Equal Protection Clause and thus that a Title VI claim cannot be established based solely on disparate impact evidence. *See, e.g., United States v. Fordice,* 505 U.S. 717, 732 n.7 (1992). On the other hand, the Title VI regulations that Ms. Sandoval seeks to enforce purport to bar not only those actions that *intentionally* discriminate against protected groups, but also those actions "which *have the effect* of subjecting [individuals] to discrimination on the basis of their race, color, or national origin." 49 C.F.R. § 21.5(b)(2), 28 C.F.R. § 42.104(b)(2) (emphasis added). The district court rejected Ms. Sandoval's intentional discrimination claims. Pet. App. 64a. Thus, Ms. Sandoval cannot prevail in this case unless she can establish that Congress intended to permit private citizens to bring suit to enforce Title VI regulations that adopt substantive provisions materially different from the substantive provisions of Title VI itself.

The Court granted a certiorari petition whose Question Presented asked whether Congress impliedly intended to create such a cause of action. Answering that question will require a careful examination of congressional intent. The issue of congressional intent quite clearly encompasses the question whether Congress authorized federal agencies to adopt Title VI regulations that purport to reach conduct that, although not intentionally discriminatory, nonetheless has a disparate impact on the basis of race, color, or national

origin. If the evidence demonstrates that Congress did not authorize the adoption of such regulations, then that evidence would also demonstrate that Congress did not impliedly intend to permit private rights of actions to enforce such invalid regulations. Accordingly, *amici* respectfully suggest that the Court begin its analysis by examining the validity of the regulations that Ms. Sandoval seeks to enforce. The validity of the regulations is a "subsidiary question fairly included" within the question presented by Petitioners. SUP. CT. R. 14.1(a).

In her brief in opposition to the certiorari petition, Ms. Sandoval insisted that the question of the validity of the regulations is not before the Court. Opp. Br. 13-14 n.7. She argued that the Question Presented "does not seek review of the validity of the discriminatory effects regulations, only their private enforcement." *Id.*

For the reasons outlined above, Ms. Sandoval's argument is mistaken. Moreover, in case there was any doubt on this score, the Department laid that doubt to rest in its reply brief. The Department stated explicitly: "The question whether the regulations are valid is fairly embraced in the question whether private litigants may enforce them." Reply Br. 6 n.3.[5]

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[5] The Department reiterated that position in a supplemental brief filed in support of the certiorari petition. The supplemental brief took issue with the Executive Branch's enforcement of Title VI regulations, as exemplified by a new U.S. Department of Justice Policy Guidance on discrimination against non-English speakers. The brief stated:

> "DOJ states that its Policy Guidance "does not create new obligations, but rather, clarifies existing Title VI responsibilities." (continued...)

Alternatively, *amici* submit that the validity of the disparate impact regulations should be considered because it is a question of law that is a "predicate to an intelligent resolution" of the question on which the Court granted certiorari. *Vance v. Terrazas,* 444 U.S. 252, 258-59 n.5 (1980). It makes little sense to devote the Court's limited resources to resolution of an issue -- the existence of an implied right of action -- that will be of no relevance if, as *amici* contend, the underlying disparate impact regulations are invalid. As the Court has recognized, it "retains the independent power to identify and apply the proper construction of governing law," regardless whether or to what extent any party is pressing for that construction. *United States Nat'l Bank v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993).

Ms. Sandoval also asserts that the validity of the regulations is not properly before the Court because that issue was not raised or considered in the Eleventh Circuit. Opp. Br. 13 n.7. That assertion is incorrect. As noted *supra* at 5 n.3, the Department's Eleventh Circuit brief never conceded the validity of the disparate impact regulations; indeed, the brief cited this Court's *Fordice* decision in support of the proposition that those regulations were subject to question. 11th Cir. Br. at 29. More importantly, the Eleventh Circuit understood the Department

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[5](...continued)
Supp. App. at 14a, 15a-16a. Alexander and the Department disagree because the Policy Guidance directs agencies to impose an affirmative obligation of accommodation that it greater than the congressionally mandated Title VI obligation to refrain from intentional discrimination.

Supp. Br. 6 n.3.

to be challenging the validity of the disparate impact regulations, stating, "Appellants argue that the Supreme Court in *United States v. Fordice* overruled *Guardians* . . ." Pet. App. 47a n.24. The Eleventh Circuit proceeded to consider (and ultimately reject) that argument. *Id.* at 35a-36a, 48a n.24. Similarly, the district court considered and ultimately upheld the validity of the disparate impact regulations. Pet. App. 74a, 90a, 98a. Because the lower courts fully considered and rejected arguments that the disparate impact regulations were invalid because Congress had not authorized adoption of such regulations, the Court should not hesitate to consider those arguments as well.

Amici recognize that the Department has placed limited emphasis on its claim that the disparate impact regulations are invalid. It has chosen instead to devote most of its brief to demonstrating that even if Congress authorized federal agencies to adopt disparate impact Title VI regulations, it did not intend to permit private enforcement of those regulations. But because the validity of the regulations was raised and considered by the courts below and because that issue is "fairly embraced" within the Question Presented upon which the Court granted certiorari, the issue of the regulations' validity is properly before the Court.

II. THE DECISION BELOW WAS BASED ON THE ERRONEOUS ASSUMPTION THAT *GUARDIANS* DETERMINED THAT CONGRESS AUTHORIZED FEDERAL AGENCIES TO INCORPORATE A DISPARATE IMPACT STANDARD INTO TITLE VI REGULATIONS

The Department is subject to Title VI by virtue of its receipt of funding from the U.S. Department of Transportation (DOT). Consideration of whether DOT could validly incorporate a disparate impact standard into its Title VI regulations must begin with the Constitution and Title VI itself. The Court has held that the Equal Protection Clause prohibits only instances of intentional discrimination and does not address conduct that has a disparate impact on protected groups but is not intentionally discriminatory. *Washington v. Davis,* 426 U.S. 229 (1976). The Court has also held that Title VI extends no farther than the Equal Protection Clause and thus that a Title VI claim cannot be established based solely on disparate impact evidence. *Fordice,* 505 U.S. at 732 n.7; *Regents v. Bakke,* 438 U.S. 281, 284-87 (1978) (Powell, J., concurring in the judgment); *id.* at 328 (Brennan, White, Marshall, and Blackmun, JJ, concurring in the judgment in part and dissenting in part). Indeed, the Eleventh Circuit acknowledged that Ms. Sandoval's failure to demonstrate discriminatory intent in this case precluded a cause of action under either Title VI or the Equal Protection Clause. Pet. App. 34a.

Having properly acknowledged the limited scope of protection provided by the Constitution and Title VI, the Eleventh Circuit then embarked on a misguided analytical detour, based on a misreading of this Court's decisions. The appeals court stated that this Court's decisions in *Guardians* and *Alexander* held that a federal agency's issuance of disparate impact regulations is a valid exercise of its authority under Section 602, 42 U.S.C. § 2000d-1. Pet. App. 35a-37a. However, properly read, neither of those decisions encompasses such a broad and erroneous holding.

Guardians involved an allegation that a last-hired/ first-fired policy for lay-offs of police officers had a disparate impact on black and Hispanic police officers because officers were hired in order of their examination scores, and members of those racial groups on average scored lower on the examinations. The Second Circuit denied the plaintiffs' damages claim under Title VI on the ground that a Title VI cause of action requires proof of discriminatory intent.

A fractured Supreme Court affirmed, but without producing a majority opinion. Seven Justices agreed that no Title VI cause of action could be established in the absence of evidence of intentional discrimination. *Guardians,* 463 U.S. at 610 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 642 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). However, the Court was far less united in its views regarding the Title VI disparate impact regulations. Four Justices who voted to affirm the Second Circuit stated that administrative agencies could not validly incorporate a disparate impact standard into Title VI regulations once it had been determined that Title VI itself did not incorporate such a standard. *Id.* at 611 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.); *id.* at 613 (O'Connor, J., concurring in the judgment). The four dissenting Justices stated that the disparate impact regulations were valid. *Id.* at 623 (Marshall, J., dissenting); *id.* at 645 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). Justice White stated that the Second Circuit should be affirmed on the ground that monetary relief is unavailable in an action brought pursuant to the Title VI regulations where there is no allegation of intentional discrimination. *Id.* at 593-98 (White, J., concurring in the judgment). Justice White also stated in *dictum* that the Title VI disparate impact regulations were valid, but that *dictum* played no part in the disposition of the case. *Id.* at 589-93.

Because five Justices in *Guardians* (the four dissenters plus Justice White) stated that the Title VI disparate impact regulations were valid, the Eleventh Circuit concluded that *Guardians* "held" that those regulations were valid. But as the Court emphasized once again just this past term, "This is simply not the way that reasoned constitutional adjudication proceeds." *United States v. Morrison,* 120 S. Ct. 1740, 1757 (2000). One cannot glean the Court's "holding" in a case by adding together the views of concurring and dissenting Justices, even when the sum is five or greater. Rather, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Nichols v. United States*, 511 U.S. 738, 745 (1994) (quoting from *Marks v. United States,* 430 U.S. 188, 193 (1977)). Thus, in *Morrison* the Court rejected the argument that a view joined in by three concurring Justices and three dissenting Justices constituted a "holding" of the Court in *United States v. Guest,* 383 U.S. 745 (1966). *Morrison,* 120 S. Ct. at 1757.[6]

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[6] If Supreme Court "holdings" really were defined so expansively, creative litigants would have little difficulty in uncovering a "holding" to support virtually any proposition of law. For example, by combining the views of six justices expressed in two separate cases, one could plausibly argue that the Court has already "held" that Congress did not intend to permit private enforcement of the Title VI disparate impact regulations. The four justices in *Guardians* who declared the disparate impact

(continued...)

Accordingly, the only "holding" in *Guardians* is the narrowest grounds agreed to among the five Justices who voted to affirm the Second Circuit's decision -- namely, that without evidence of discriminatory intent, there can be no cause of action for damages based on violation of Title VI or its implementing regulations. The Eleventh Circuit's finding that *Guardians* had upheld the Title VI disparate impact regulations was based on its erroneous belief that a "holding" can be discerned by adding together the views of concurring and dissenting Justices.

The appeals court also claimed that the Court upheld the Title VI disparate impact regulations in *Alexander*. Pet. App. 36a, 38a. That claim is a misreading of *Alexander*, which had nothing to do with Title VI but rather involved the Rehabilitation Act of 1973 (the "Act"), a law loosely patterned after Title VI. The plaintiffs in that case were Medicaid recipients who sought declaratory and injunctive relief from a State's reduction in the number of inpatient hospital days that the State's Medicaid program would pay

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[6](...continued)
regulations invalid (Justices O'Connor, Rehnquist, and Powell, and Chief Justice Burger) clearly did not endorse a private right of action to enforce those invalid regulations. *Guardians*, 463 U.S. at 610 (Powell, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment). Two of the dissenters in *Guardians*, Justices White and Blackmun, had previously dissented in *Cannon* because they did not believe that Congress had intended to create a private right of action either under Title VI or under Title IX of the Education Amendments of 1972. *Cannon*, 441 U.S. at 714-730 (White, J., dissenting). Thus, applying the Eleventh Circuit's fractured logic, one could add the votes of Justices White and Blackmun from *Cannon* to the votes of the four above-referenced justices in *Guardians* to arrive at the conclusion that six justices "held" that there is no implied private right of action under the Title VI disparate impact regulations.

on behalf of the recipients. *Alexander*, 469 U.S. at 289. The plaintiffs alleged that the State's reduction had a disparate impact on the handicapped and thus violated the Act and its implementing regulations. The unanimous and limited holding of the Court was that the plaintiffs' allegations were not cognizable under the Rehabilitation Act or its implementing regulations. *Id.* at 309. The Court's opinion includes a brief discussion of *Guardians* (*id.* at 292-94) and Title VI, but that discussion is clearly *dicta* given that *Alexander* did not involve a Title VI claim and given that the holding in the case was that the plaintiffs did *not* state a claim under the Act or its implementing regulations.

Any suggestion that the Court has already upheld the Title VI disparate impact regulations was laid to rest by *Fordice*, a suit (brought by private plaintiffs and the United States) alleging that Mississippi had not done enough to eradicate the lingering effects of past segregation in its higher education system. In response to the private plaintiffs' claims that Title VI and its implementing regulations required Mississippi to do more to eradicate those effects, the Court stated:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, *citing a regulation* to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.* We thus treat the issues in these cases as they are implicated under the Constitution.

Fordice, 505 U.S. at 732 n.7 (emphasis added) (citations omitted).

The appeals court noted this passage but rejected the Department's argument that the passage called into doubt the validity of the Title VI regulations, stating, "Nor are we persuaded that the Supreme Court would have overruled *Guardians* without *any* discussion of its precedent and in so oblique a manner as suggested by Appellants." Pet. App. 48a n.24. But the appeals court's rationale for brushing off *Fordice* proceeds from a faulty premise: *Guardians* did *not* hold that the regulations were valid, and thus there would have been no need for *Fordice* to "overrule" *Guardians* in order to question their validity.

In sum, the Court has never directly ruled on the validity of Title VI disparate impact regulations. A ruling striking down the regulations would not entail overruling any of the Court's precedents.

III. BECAUSE IT DID NOT ADOPT A DISPARATE IMPACT STANDARD FOR TITLE VI, CONGRESS CANNOT BE DEEMED TO HAVE AUTHORIZED AGENCIES TO ADOPT THAT STANDARD IN THEIR IMPLEMENTING REGULATIONS

Both Ms. Sandoval and the Eleventh Circuit concede that a Title VI cause of action requires proof of discriminatory intent. Pet. App. 34a. Section 602, 42 U.S.C. § 2000d-1, authorizes federal agencies disbursing federal funds to issue "rules, regulations, or orders of general applicability" in order "to effectuate the [anti-discrimination] provisions" of § 601. Given that § 601 does

not incorporate a disparate impact standard, it is difficult to discern how regulations incorporating such a standard could be said to "effectuate" the provisions of § 601.

As Justice O'Connor explained in *Guardians*:

> Such regulations do not simply "further" the purpose of Title VI; they go well *beyond* that purpose. . . . Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute, . . . we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with."

Guardians, 463 U.S. at 613-15 (O'Connor, J., concurring in the judgment) (citation omitted).

This is not a case where room for agency discretion in defining the scope of prohibited conduct was necessary because it was impractical for Congress to enact specific limitations. Within constitutional limits, Congress could have determined that the dangers of discrimination warranted extending Title VI protections beyond instances of intentional discrimination. That it did not do so must be regarded as a deliberate policy choice, and not as a deferral to administrative agencies to make the decision instead. The difference between prohibiting discriminatory intent and disparate impact represents precisely the type of broad public policy decision that rests in the hands of our elected legislatures, and not administrative agencies. Under these circumstances, DOT's decision to incorporate a disparate

impact standard into its Title VI regulations is not entitled to deference. *See Guardians*, 463 U.S. at 611 n.5 (Powell, J., concurring in the judgment) ("I do not question the view that the Court should sustain a reasonable administrative interpretation even if we would have reached a different result had the question initially arisen in a judicial proceeding. . . . But I know of no precedent whatever for asserting that this deference to administrative interpretation is proper *after* this Court already has issued a definitive -- and contrary -- construction of its own.") (citation omitted).

As noted above, *Fordice* called into serious question the validity of the Title VI disparate impact regulations. *Fordice*, 505 U.S. at 732 n.7. In an effort to distinguish *Fordice*, Ms. Sandoval asserts that *Fordice* is irrelevant to disparate impact issues because the plaintiffs there based their case on intentional discrimination claims alone, not claims of disparate impact. Opp. Br. 18. Ms. Sandoval is mistaken as to the basis of the claims in that case.

Fordice was a suit brought by private plaintiffs and the United States against Mississippi under the Equal Protection Clause, Title VI, and the Title VI disparate impact regulations; the plaintiffs claimed that Mississippi had failed to dismantle its dual system of higher education. By the time the case reached the Court in 1992, intentional racial discrimination within the Mississippi higher education system had long since ended. Thus, *Fordice* can properly be characterized as a disparate impact case; the principal issue before the Court was whether Mississippi should be forced to abandon educational practices that, although they were not intentionally discriminatory, tended to perpetuate the racial identification of public universities. The Court held that Mississippi had a remedial duty under the

Constitution to eliminate any continuing effects of its past segregation, and that that duty included an obligation to eliminate "policies and practices" lacking sound educational justification if they were "traceable to" its prior segregated higher education system and if they "continue[d] to have segregative effects." *Fordice*, 505 U.S. at [2736]. But the Court rejected the private plaintiffs' claim that Mississippi had violated Title VI regulations by failing to "take affirmative action to overcome the effects of prior discrimination." *Id.* at 732 n.7. The Court explained that neither Title VI nor its implementing regulations extended any further than the reach of the Equal Protection Clause and thus that Mississippi would be required to adopt only those remedies demanded by the Constitution. *Id.* By rejecting claims that the Title VI regulations could require remedies not demanded by the Constitution, *Fordice* implicitly rejected any Title VI regulation that purports to adopt a disparate impact standard.

In sum, there is no plausible interpretation of Title VI that would support a conclusion that Congress intended § 601 *not* to bar practices having a disparate impact on the basis of race, color, or national origin, but at the same time intended § 602 to permit federal agencies to adopt regulations that *did* bar such practices.[7]

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[7] The district court also asserted that, quite apart from Ms. Sandoval's right to sue Petitioners under the Title VI disparate impact regulations, she could also maintain her suit as a third-party beneficiary of Alabama's contractual commitment to DOT to abide by the terms of those regulations. Pet. App. 112a. That assertion is untenable. First, Ms. Sandoval's complaint never asserted such a state-law breach-of-contract cause of action. More importantly, that assertion begs the question of congressional intent; if Congress did not authorize federal agencies to issue disparate impact regulations, there is no reason to believe that it nonetheless authorized federal agencies to enter into contracts demanding

(continued...)

A. Adoption of a Disparate Impact Standard Is Unworkable and Is Inconsistent with the Legislative History of Title VI

The Court repeatedly has recognized that imposing liability on the basis "disparate impact" evidence can be disruptive of a wide-range of long-accepted practices and can even create incentives for entities to secretly engage in invidious discrimination as a means of avoiding disparate impact liability. Adoption of a disparate impact standard under Title VI risks promoting all of those undesirable results. Given the overwhelming evidence -- particularly in the legislative history -- that *intentional* discrimination on the basis of race, color, or national origin was Congress's sole focus in adopting Title VI, there can be no justification for judicial deference to administrative regulations that, by targeting policies thought to have a disparate impact among racial or nationality groups, may encourage federal fund recipients to engage in the very types of intentional discrimination Title VI was designed to prevent.

In *Hernandez v. United States*, Justice O'Connor explained well why concern over the disruptive impact of an disparate impact standard has led the Court to reject use of that standard in its equal protection analysis:

> In *Washington v. Davis*, we outlined the dangers of a rule that would allow an equal protection violation on a finding of mere disproportionate effect. Such a rule

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[7](...continued)
that federal fund recipients agree not to maintain policies having a disparate impact on the basis of race, color, or national origin.

> would give rise to an unending stream of constitutional challenges:
>
> "A rule that [state action] designed to serve neutral ends is nonetheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.*, 426 U.S. at 248.

Hernandez v. United States, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring in the judgment).

Adoption of a disparate impact standard under Title VI regulations is likely to have precisely the disruptive effects warned of in *Washington*. For example, colleges (virtually all of which are federal fund recipients) can expect their admissions processes to be subjected to frontal assault; those processes tend to have a disparate impact on less-affluent racial minorities who lack the academic preparation of more-affluent, nonminority students. Indeed, the U.S. Department of Education recently issued a draft guidance document elaborating on its Title VI regulations. The guidance document is a thinly veiled threat of enforcement action against colleges that fail to decrease their reliance on standardized tests (such as the SAT and the ACT) in the admissions process because those tests have been shown to have a disparate impact on certain racial minority groups. *See* U.S. Dep't of Education, "The Use of Tests When Making High-Stakes Decisions for Students: A Resource Guide for Educators and Policymakers" (July 6, 2000).

Validation of the disparate impact regulations also would severely test the ability of the business community to obtain necessary environmental permits. For example, the Environmental Protection Agency recently issued its "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits," 65 Fed. Reg. 39,650 (June 27, 2000). This EPA guidance document extends the Title VI disparate impact concept to applications for EPA permits. Under EPA's new view of its Title VI regulations, citizens may file a federal suit to block the grant of an EPA permit to an industrial facility located in their community by demonstrating that other communities, with lesser concentrations of members of the plaintiffs' particular racial group, are host to fewer sources of industrial pollution. Evidence of discriminatory intent would be unnecessary. Indeed, the Title VI case in which the court granted certiorari in 1998 was just such an "environmental justice" suit. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998).[8]

Moreover, the Court has recognized repeatedly that adoption of disparate impact standards may induce entities to engage surreptitiously in intentional discrimination in

[8] Although the Title VI disparate impact regulations have been on the books for decades, only in recent years have there been significant efforts to enforce those regulations apart from the requirements of Title VI itself. The absence of widespread disparate-impact challenges to commonly accepted practices may well reflect uncertainty regarding the validity of the Title VI regulations. But one could expect a sharp uptick in suits to enforce the regulations should the Court affirm the court below.

order to avoid the types of racial or ethnic imbalance that can give rise to disparate impact lawsuits. For example, in *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), the plurality warned against adoption of rules making it more difficult for employers to defend against Title VII disparate impact litigation, because:

> Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, . . . and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII. . . . If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.

Watson, 487 U.S. at 993 (plurality) (citations omitted).[9]

The same danger exists if the Court upholds the Title VI disparate impact regulations. That danger is perhaps best illustrated in the field of higher education. In 1996, in the face of concerns that extensive affirmative action programs adopted by state agencies amounted to intentional discrimination against nonminorities, California voters adopted Proposition 209, which outlawed racially preferential practices in employment, contracting, and

[9] *See also, Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring in the judgment).

education. After those practices were eliminated, minority enrollment declined at a number of prestigious public universities. The U.S. Department of Education responded by opening a massive (and still ongoing) investigation into potential Title VI disparate impact violations by California in its university admissions practices. Patrick Healy, "A Lightning Rod on Civil Rights," *The Chronicle of Higher Education* at A42 (Sept. 17, 1999). The lesson is obvious: federal fund recipients seeking to avoid liability under the Title VI disparate impact regulations should adopt the types of racial preferences rejected as potentially unconstitutional by California voters when they adopted Proposition 209.

There can be little doubt that outlawing *intentional* discrimination on the basis of race, color, or national origin by federal fund recipients -- not neutral policies having a disparate impact -- was Congress's sole focus in adopting Title VI. *See, e.g., Cannon,* 441 U.S. at 704. The legislative history of Title VI is replete with references to the statute's singular focus on intentional discrimination. *See id.* at 711 n.48; 110 Cong. Rec. 6562 (1964) (remarks of Sen. Kuchel in support of Title VI) (a local government agency "ought not to receive [federal aid] if it is dedicated to use it in an unconstitutional manner"); *id.* at 6544 (Sen. Humphrey). Yet, as noted above, validation of the Title VI disparate impact regulations would tend to undermine that singular purpose by providing federal fund recipients with incentives to engage in the very types of racially preferential practices that Title VI was designed to eliminate.

Finally, adopting disparate impact analysis under Title VI would be totally unworkable. In the employment context (where disparate impact analysis applies by virtue of Title VII), Congress has prescribed that an employer may

continue a practice causing disparate impact if it can demonstrate that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(I). Determining whether an employer has made those demonstrations can often be very difficult; but at least courts can assume that the employer's ultimate goal is to maximize profits, and job-relatedness and business necessity can be measured based on whether a practice significantly advance profitability.

Title VI cases, on the other hand, arise outside the employment context and thus lack an economic grounding that would allow for objective determinations regarding whether a challenged practice is really "necessary." This case well illustrates the unworkability of disparate impact analysis in the context of Title VI. Alabama adopted its English-only rule in part for the purpose of encouraging use of English by all its residents; promotion of a common language is viewed by backers of "official English" legislation as an effective means of promoting a unifying heritage among Americans and helping to integrate non-English speakers into the broader society and economy. It is impossible to quantify the "necessity" of those goals in our society, and thus impossible for judges to determine objectively whether those goals are really "necessary." The Eleventh Circuit evidently believed that those goals were not sufficiently important to justify the Alabama English-only rule at issue in this case, because it struck down the rule under a disparate impact analysis. Not surprisingly, however, the appeals court's opinion contains absolutely *no* discussion regarding how the court arrived at that conclusion, because there simply is no principled basis for making that decision. The decision ultimately comes down to a judge's philosophical views regarding the importance of

a common language in our pluralistic society. The absence of any objective standards by which judges can determine whether a challenged practice is sustainable provides strong additional grounds for striking down the Title VI disparate impact regulations.

B. Congress Cannot Be Said to Have Ratified the Disparate Impact Regulations

Ms. Sandoval in her opposition brief (and the United States as a supporting *amicus curiae* below) argued that regardless whether Congress in 1964 authorized adoption of Title VI disparate impact regulations, it has long since ratified those regulations through adoption of subsequent legislation. Opp. Br. 21-23; U.S. Eleventh Cir. Br. 34-38. That argument is without merit.

The two statutes upon which Ms. Sandoval and the United States base that argument are the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7; and the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 259. The Rehabilitation Act Amendments purported to abrogate the States' Eleventh Amendment immunity from a variety of civil rights laws, including Title VI. The Civil Rights Restoration Act broadened the coverage of Title VI to include a prohibition against discrimination by *any* portion of a fund recipient's operations, not simply by the fund recipient's specific program that receives federal funds.[10]

[10] The statute was intended to reverse the Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984).

The gist of Ms. Sandoval's and the United States's argument is that Congress must have endorsed the Title VI disparate impact regulations when it expanded the scope of Title VI's coverage in 1986-88, because it was well aware at that time that *Guardians* and *Alexander* had upheld those regulations yet it did not attempt to narrow the potential disparate impact liability of those entities newly covered by Title VI. The fallacy in that argument is that -- as noted above -- *Guardians* and *Alexander* did *not* uphold the Title VI disparate impact regulations. Because the validity of those regulations was still an open question at the time that the two statutes were enacted, no conclusion regarding congressional endorsement can be drawn from Congress's expansion of Title VI's coverage without addressing the disparate impact regulations.[11]

In support of her view that the Restoration Act validated Title VI disparate impact suits by private litigants, Ms. Sandoval cites repeatedly to warnings by *opponents* of the Act that some courts had upheld disparate impact suits by private litigants, thereby "rais[ing] the spectre that broadening the scope of Title VI would spur additional lawsuits against federal funding recipients." Opp. Br. 22. *Amici* respectfully suggest that statements made by opponents of legislation is of little relevance regarding the

[11] During that time frame, the validity of the Title VI disparate impact regulations was an open question not only in this Court but in the federal appellate courts as well. *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) ("[W]e need not reach the apparently still unsettled question of whether Title VI requires a showing of intentional discrimination. . . . Nor need we consider the proposition, supported by at least four members of the Court [in *Guardians*], that non-discrimination regulations promulgated under Title VI may be found violated upon a showing only of disparate impact.")

legislation's intended meaning. In any event, opponents would have had every reason to argue as they did regardless whether they believed that there was a *possibility* that courts would uphold the disparate impact regulations and would recognize a private right of action to enforce the regulations, or whether they believed (as suggested by Ms. Sandoval) that courts had already done so.

The Court's discussion of the Rehabilitation Act in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), puts to rest any argument that the Act should be viewed as congressional ratification of the Title VI disparate impact regulations:

> Without in any way altering the existing rights of action and the corresponding remedies permissible under Title IX, Title VI, § 504 of the Rehabilitation Act, and the Age Discrimination Act, Congress broadened the coverage of these antidiscrimination provisions of this legislation.

Franklin, 503 U.S. at 73. Because the Title VI disparate impact regulations could not be said at the time of the Act's enactment in 1988 to constitute an "existing right[] of action" under Title VI -- indeed the validity of those regulations was placed very much up in the air following *Guardians* -- there is no merit to the argument that Congress ratified the regulations when it adopted the Act.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment below.

Respectfully submitted,

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No. 99-1908

NOV 13, 2000

IN THE
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Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR BEAUTY ENTERPRISES, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF FOR BEAUTY ENTERPRISES, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Beauty Enterprises, Inc. ("BEI") is a closely held, 30-year-old Connecticut corporation with its principal office in Hartford. Its business has always been the wholesale distribution of beauty products (skin and hair care products,

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters of such consent have been filed with the Office of the Clerk of this Court.

cosmetics, etc.) designed primarily for African-Americans and other people of color. Today, it has customers in almost every region of the country, and in addition to its warehouse in Hartford, it has warehouses in: Birmingham, Alabama; Romulus, Michigan; Brooklyn, New York; Baltimore, Maryland; and Capital Heights, Maryland. It employs approximately 325 people. One third of its work-force is African-American. Twenty-two percent are Hispanic. Eleven percent are recent immigrants from countries such as Russia, Poland and Bosnia.

The question presented to this Court may well entail consideration of English-only workplace practices and policies such as the one that has been adopted by BEI. Specifically, this Court may decide in this case whether language can be equated with a person's national origin, such that the adoption and maintenance of an English-only practice or rule can be considered national origin discrimination in violation of a Title VI disparate impact regulation, at least under certain circumstances. BEI is vitally interested in this issue because it long ago adopted and has continuously maintained a Speak Only English rule for its workforce. A decision in this case may well have implications for BEI under Title VII. It is important, therefore, that this Court understand the very practical business interests that led BEI to adopt its English-only workplace rule. Reported cases confirm that these interests are not unique to BEI, but are present in most businesses with a similarly diverse workforce.

SUMMARY OF ARGUMENT

The Court should reverse the holding below in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), which otherwise could be construed to prevent English language workplace policies that are no more discriminatory than the English-language texts of the Declaration of Independence and Constitution of

the United States of America. The 11th Circuit's holding that "Title VI flatly prohibits . . . English language policies that cause disparate impact on the basis of national origin" (citing *Lau v. Nichols*, 414 U.S. 563 (1974)) contorts this Court's ruling in *Lau*, the underlying premise of which was that ethnically Chinese American citizens who do not understand English need to be taught English first in order to participate fully in public schools. Finally, amicus respectfully urges the Court to clarify that nothing in *Lau* or in any law of the United States should be construed to prohibit workplace policies that require utilization of our common American English language for sound business reasons, including workplace safety, harmony, and efficiency. American workers deserve no less.

ARGUMENT

I. *LAU V. NICHOLS* NEITHER SUPPORTS THE 11TH CIRCUIT HOLDING THAT "TITLE VI FLATLY PROHIBITS . . . ENGLISH LANGUAGE POLICIES THAT CAUSE DISPARATE IMPACT ON THE BASIS OF NATIONAL ORIGIN" NOR PROVIDES ANY NOTICE THAT "ENGLISH LANGUAGE POLICIES, WHICH CAUSE A DISPARATE IMPACT," MAY BE ILLEGAL.

The 11th Circuit held that "Title VI flatly prohibits . . . English language policies that cause disparate impact on the basis of national origin," *Sandoval v. Hagan*, 197 F.3d at 495, and that "*Lau* and it subsequent legislative history . . . unambiguously notify state recipients of federal funds that English language policies, which cause a disparate impact on the ability of non-English speakers to enjoy federal benefits, may violate Title VI." 197 F.3d at 497. *Amicus* respectfully suggests that *Lau*, if it remains good law, does not support the Court of Appeals' holding that Alabama's English-language requirements for drivers constitutes national origin

discrimination in violation of regulations issued under Section 602 of Title VI. Assuming *arguendo Lau* had at one time supported such a proposition, it has been overruled *sub silentio* by this Court's more recent jurisprudence. Likewise, *Lau* should not be read to put BEI or any other American company on notice that an English language workplace rule such as the one adopted by BEI "will [be] presume[d to] violate[] Title VII." 29 C.F.R. 1606.7(a) (EEOC's guideline for "Speak-English-only rules").

The lengths to which the Court of Appeals went in discussing *Lau* in the wake of this Court's decisions in *Alexander v. Choate*, 469 U.S. 287 (1985), *Guardians Assn. v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983), *University of California Board of Regents v. Bakke*, 438 U.S. 265 (1978) and *United States v. Fordice*, 505 U.S. 717 (1992), demonstrate the need for this Court to clarify this uncertain body of law.

In *Lau*, the Supreme Court held that the failure of the San Francisco public schools to either provide English language instruction to Chinese-speaking students or teach these students in Chinese violated regulations promulgated by the Department of Health, Education and Welfare ("HEW") pursuant to its authority under Section 602 to enforce the nondiscrimination provision in Section 601. The underlying premise of *Lau* was that ethnically Chinese American citizens need to be taught English first in order to participate fully in the federally funded San Francisco public schools.

In several respects, *Lau* neither dictates nor suggests the holding of the Court of Appeals. First, the Court in *Lau* did not determine the remedy for this violation. Indeed, it noted that "[n]o specific remedy is urged upon us." 414 U.S. at 564. Here, the Court of Appeals did not hold illegal Alabama's failure to provide English-language instruction to enable non-

English speaking persons to qualify for a driver's license.[2] Instead, it found illegal the failure of Alabama to allow non-English speaking persons the privilege to drive without learning even the basics of English. This finding is inconsistent with the remedy implicitly recommended by this Court in *Lau:* "the [school] district must take affirmative steps to rectify the language deficiency . . . ." 414 U.S. at 568 (quoting HEW clarifying guidelines) (internal quotation marks omitted).

Second, three concurring Justices in *Lau* focused on interpretive guidelines issued by the HEW Office of Civil Rights, which "clearly indicate that affirmative efforts to give special training for non-English speaking pupils are required by Title VI as a condition for receipt of federal aid to public schools." 414 U.S. at 570 (Stewart, J., with Burger, C.J. and Blackmun, J., concurring in the result). Unlike the HEW regulations and guidelines at issue in *Lau*, DOT and DOJ regulations do not require any affirmative steps to be taken by grant recipients with respect to non-English speaking drivers.

Third, the HEW regulations at issue in *Lau* pertained to education, not the public health and safety. Where education is concerned, federal requirements are geared to ensuring that all students are given a meaningful education. Where the public health and safety is implicated, federal requirements ensure that labels, instructions, warnings, and signals are in English so that they can be understood and observed. For those performing safety functions, including commercial operators of motor vehicles, federal requirements provide that they must be able to speak, read, write, and understand the English language. While the Eleventh Circuit did not accept the safety rationale behind Alabama's English-language requirement, it is obvious that the English-language

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[2] Alabama reportedly provides English-language instruction under several programs.

requirements of federal agencies, most notably the grantor department in this case, DOT, are based primarily if not entirely on safety.

Thus, far from following *Lau*, the Court of Appeals transformed *Lau* into something this Court has never countenanced, and should not embrace now. Rather, amicus respectfully urges the Court to clarify that neither *Lau* nor any other law of the United States prohibits workplace policies that require utilization of our common American English language for sound business reasons, including workplace safety, harmony, and efficiency.

II. NOTHING IN TITLE VI OR TITLE VII PROHIBITS WORKPLACE POLICIES THAT REQUIRE UTILIZATION OF OUR COMMON AMERICAN ENGLISH LANGUAGE FOR SOUND BUSINESS REASONS.

For the purposes of comparing the substantive law underlying this case (Title VI) with the law upon which the EEOC has threatened to sue Beauty Enterprises (Title VII), Title VI and Title VII contain identical nondiscrimination proscriptions. Section 601 of Title VI, which is incorporated by reference into Section 602, provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. §2000d. Title VII prohibits employment practices that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(2).

Regardless of the "contractual framework [that] distinguishes Title [VI] from Title VII," *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 286 (1998), they both contain the term "national origin" within their respective nondiscrimination proscription. Accordingly, any acknowledgment by this Court that language can and should be equated with "national origin" will substantively affect "the law" to which Beauty Enterprises and other American companies will have to conform their workplace practices.

Specifically, were this Court to affirm the 11th Circuit below, it would effectively ratify the EEOC's Speak English Only rule guidelines and place its imprimatur on the unwarranted presumption of discriminatory impact that those guidelines establish. In the process of ratifying the EEOC guidelines, this Court would effectively overrule the two federal court decisions that have rejected the guidelines. In *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), the 9th Circuit held: "We do not reject the English-only rule Guideline lightly[,]" but "[w]e will not defer to an administrative construction of a statute where there are compelling indications that it is wrong." (internal quotations and citations omitted). The Court of Appeals added:

> We are not aware of, nor has counsel shown us, anything in the legislative history to Title VII that indicates that English-only policies are to be presumed discriminatory. Indeed, nowhere in the legislative history is there a discussion of English-only policies at all.

Id. at 1490. Likewise, in *Long v. First Union Corp. of America*, 894 F. Supp. 933 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996), the District Court held that: "This Court is not bound by the EEOC guidelines, . . . and does not find the language of Title VII supportive of the EEOC's

conclusion." 894 F. Supp. at 940 (quoting *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94-95 (1973)).

Were this Court to affirm the 11th Circuit, employers in BEI's position – *i.e.*, employers with no intention of doing anything discriminatory and who simply wish to create a workplace that is safe and free of ethnic tension for its diverse workforce – would no longer be able to use a Speak English Only rule to accomplish these objectives, absent business *necessity*, as determined by some outside agency, either the EEOC and/or a federal district court.

BEI's English language workplace rule was the result of a sound and reasoned business decision. More than twenty years ago, as the then fledgling BEI was starting to grow, its founder and President, Robert Cohen, personally observed that there was tension and low morale within certain segments of his warehouse workforce and that this was adversely affecting the efficiency of the operation. He was determined to discover the reasons, and, to this end, embarked upon an investigation that consisted of discussions with employees and extensive observations of employee behavior in BEI's warehouse. Cohen discovered that the principal cause of the tension and low morale was that there were English-only speaking employees, including many African-Americans, who thought that they were being ridiculed by Spanish-speaking employees in a language they did not understand – Spanish. On several occasions, this perception actually led to fights in the warehouse.

This discovery led Cohen to consider a Speak Only English rule. He concluded that such a rule would not only eliminate these distressing encounters between his Spanish-speaking and non-Spanish-speaking workers, but it would eliminate, or at least reduce, other problems as well, one of which was safety-related.

A distribution company's warehouse operation is much like a supermarket, with people using shopping cart-type vehicles and moving from place to place picking items from shelves and depositing them in their carts. However, unlike a supermarket, the vehicles BEI employees used were large, the items picked were frequently large boxes and the shelves on which items were stored were high. To retrieve items high on these shelves, employees had to climb ladders and maneuver down from these ladders with items in their hands. At the same time, and unlike a supermarket, forklift trucks moved amongst the aisles delivering product from station to station and actually placing items on shelves. The potential for accidents – boxes falling, people falling off ladders, collisions with forklifts and the like – was always present, and, in fact, this potential was at the time materializing with alarming frequency. Cohen believed that a Speak Only English rule would reduce the potential for accidents and promote employee safety, because it would facilitate communication among employees during their work and allow for understandable warnings from one employee to another. Experience has validated this belief.

Cohen also believed that a Speak Only English rule would overcome another impediment to efficiency, specifically the "out of stock" condition. In an operation like BEI's, the absence of an item on a shelf – an "out of stock" condition – is a constant problem. It is also a source of frustration for employees who are "picking" an order that calls for an item temporarily out of stock. The warehouse workforce includes individuals with responsibility for correcting these "out of stock" conditions. These individuals should know whether the condition is the result of not having the product anywhere at the facility, or if it is simply the result of not moving product from the receiving area to the warehouse shelves in a sufficiently timely manner.

In a perfect world, pickers would quickly communicate the existence of an out of stock condition to warehouse employees, and these employees, in turn, would be able to tell the pickers when the problem would be eliminated. However, frequently there was a lack of communication. Spanish- or Russian-speaking pickers would congregate and complain to each other in their native tongues about what turned out to be an out of stock condition, but non-Spanish or non-Russian Speaking employees, as the case may be, in a position to address these complaints would not understand the complaints and, therefore, fail to address them in a timely fashion. Cohen concluded that a Speak Only English rule could overcome these problems and, in this way, promote a more efficient operation. Experience has validated this conclusion.

For these reasons, and generally to avoid confusion that was occurring in a warehouse where but for the rule a significant number of different languages could conceivably have been spoken, BEI adopted a Speak Only English rule – a rule requiring employees to speak only English while they were working. At lunch or on their breaks, employees are free to speak in the language of their choosing. Cohen understood that this rule would deprive employees of the ability to speak in the language of their choice while they were working, but the ability to speak and write English had always been (and remains) a requirement for employment at BEI. BEI's workforce has always been at least bilingual. Hence, he concluded that BEI could promote its interests in having such a rule without imposing any hardship on employees. Indeed, he believed that such a rule would make BEI a more pleasant and less frustrating place for employees to work. Experience has validated this belief.

BEI's Speak Only English rule produced the hoped for results. Not only were tensions reduced, but safety incidents

decreased and efficiency improved. And for more than twenty years, there were few, if any, complaints from employees. The vast majority of the workforce, regardless of their native language, has always endorsed the rule and enthusiastically embraced it.

Recently, however, a local Hispanic politician (a state legislator from Hartford) colluded with a disgruntled former employee, another Hispanic, and enlisted a small group of BEI Hispanic employees (fifteen to be exact[3]), to file disparate impact national origin discrimination charges with the EEOC based on BEI's workplace Speak Only English rule. The motivation for this action remains unclear. Nonetheless, despite the fact that the EEOC's guideline on the subject, deeming such rules presumptively illegal,[4] has been rejected by at least two Courts of Appeals, the EEOC invoked its "Speak-English-only rules" guideline to find reasonable cause and threaten suit based on an alleged disparate impact upon BEI's Spanish-speaking employees.

A Supreme Court decision in the instant case squarely holding that language cannot be presumptively equated with national origin will end this threat to BEI's long standing rule and preserve the workplace benefits this rule has produced – benefits not only to BEI's business, but also to its employees whatever their national origin. In contrast, a contrary decision may well require BEI again to experience the very real and very serious problems that its Speak Only English rule has largely eliminated.

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[3] Of these fifteen, only five are full-time BEI employees. The remaining ten are placed individuals from temporary staffing organizations.

[4] The EEOC guideline ("Speak-English-only rules") provides that the EEOC "will presume that a rule [requiring employees to speak only English at all times in the workplace] violates Title VII and will closely scrutinize it." 29 C.F.R. 1606.7(a). "An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity." 29 C.F.R. 1606.7(b).

Amicus respectfully urges the Court to clarify that nothing in *Lau* or in any law of the United States should be construed to prohibit workplace policies that require utilization of our common American English language, at least not where there are legitimate business reasons for such policies (as opposed to business necessity) and the policies are not an instrument of intentional discrimination on the basis of national origin. American employers, as well as American workers, deserve no less.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below of the United States Court of Appeals for the Eleventh Circuit.

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In the
Supreme Court of the United States

NOV 13, 2000

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress intended to create a private cause of action in federal court against a state agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) and the Center for Equal Opportunity respectfully submit this brief amicus curiae in support of Petitioner.[1] Written consent for amici participation in this case has been obtained from all parties and has been lodged with the Clerk of the Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

Attorneys for Pacific Legal Foundation have previously litigated questions regarding the scope and meaning of Title VI of the Civil Rights Act of 1964. For example, Pacific Legal Foundation attorneys represented the California State Board of Education in a case that alleged California's Proposition 227, an initiative replacing bilingual education with English immersion, violated federal regulations promulgated pursuant to Section 602 of Title VI. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998). Pacific Legal Foundation also participated as amicus in *Cureton v. National Collegiate Athletic Association*, 198 F.3d 107 (3d Cir. 1999), a case

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[1] Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

alleging that minimum standardized testing scores had a disparate impact on African-American student athletes in violation of regulations promulgated under Section 602 of the Civil Rights Act.

PLF has a long history of advocacy before this Court and has participated in numerous cases involving the interpretation of federal laws. For example, PLF was amicus curiae in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Center for Equal Opportunity (CEO) is a District of Columbia nonprofit corporation. CEO's main purpose is to study issues concerning race, ethnicity, and language. CEO has participated actively in a wide variety of civil rights cases. *Rice v. Cayetano*, 528 U.S. 495 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

PLF and CEO believe their public policy perspective and litigation experience will provide an additional viewpoint on the legal issues presented by this case.

STATEMENT OF THE CASE

Alabama has amended its constitution to make English the official language of the state. Ala. Const. amend. 509.[2] Acting

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[2] Amendment 509 reads in relevant part:

> English is the official language of the state of Alabama. The legislature shall enforce this amendment by appropriate legislation. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role
>
> (continued...)

under this amendment, the Alabama Department of Public Safety adopted a policy requiring that all driver's license examinations be given in English. *Sandoval v. Hagan*, 197 F.3d 484, 502 (11th Cir. 1999). Martha Sandoval filed suit against the Department and its Director, challenging the English-only requirement. The gravamen of the suit alleged that Alabama's policy discriminated on the basis of national origin in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and its implementing regulations.

The United States District Court for the Middle District of Alabama certified a plaintiff's class consisting of all legal residents of the State of Alabama who are otherwise qualified to obtain a driver's license but cannot do so because of the English language testing requirement. *Sandoval*, 197 F.3d at 488. The court ultimately concluded that Alabama's English-only driver's license requirement has a disparate impact on the basis of national origin and thus ran afoul of regulations promulgated by the United States Department of Transportation.[3] The court enjoined the use of the English-only testing policy. *Id.* at 489.

(...continued)

> of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama.

[3] The regulations at issue in this case prohibit recipients of federal funding from adopting or enforcing policies that "directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons [individuals] to discrimination based on their race, color, or national origin." 49 C.F.R. § 21.5(b)(2), 28 C.F.R. § 42.104(b)(2).

The Eleventh Circuit Court of Appeals affirmed.[4] Relying on Eleventh Circuit precedent the court concluded that a private right of action exists under regulations promulgated pursuant to Section 602 of Title VI. *Id.* at 504. The court also observed that the only other circuit to have addressed the question in detail has also concluded that an implied private right of action exists under regulations promulgated under Section 602. *Id.* at 504 (citing *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 936-37 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998)). The court also based its conclusion on this Court's "strong[] suggest[ion]" that an implied cause of action exists under Section 602. *Id.* The Eleventh Circuit, although recognizing that this Court had not squarely answered the question, ultimately held that a "close reading" of *Lau v. Nichols*, 414 U.S. 563 (1974), *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985), supported the conclusion that an implied private right of action exists under Section 602. *Id.* Based on this legal conclusion, the court held that the district court did not err in its conclusion that the English-only examination requirement constituted a disparate impact on the basis of national origin. *Id.* at 511.

SUMMARY OF ARGUMENT

The question presented by this case, whether Congress intended to create a private cause of action allowing private

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[4] The court below held that the action was not barred by the Eleventh Amendment. First, because the Alabama Department of Public Safety had voluntarily accepted federal funding it had waived a claim of sovereign immunity. *Sandoval*, 197 F.3d at 500. Second, even if the action against the state itself was barred, the action against the director for injunctive relief could proceed under the *Ex Parte Young* doctrine. *Id.*

individuals to enforce disparate impact regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964, requires this Court to address two separate, but ultimately intertwined, issues. First, may Title VI, and the agency regulations promulgated under that statute, extend beyond the Fourteenth Amendment to prohibit not only purposeful discrimination, but also conduct having a disparate impact? Second, assuming Title VI regulations do prohibit conduct having a disparate impact, did Congress intend to create a private right of action to allow individuals to enforce those regulations? Both questions should be answered in the negative.

ARGUMENT

I

THIS COURT SHOULD HOLD THAT TITLE VI AND ITS REGULATIONS REACH NO FURTHER THAN THE FOURTEENTH AMENDMENT AND THEREFORE IMPLEMENTING REGULATION MAY PROHIBIT ONLY INTENTIONAL DISCRIMINATION

Before addressing the question of whether Congress intended to create a private right of action to enforce disparate impact agency regulations promulgated under Section 602, this Court must first address a more basic question regarding the scope and purpose of that section: Whether regulations that prohibit discriminatory impacts are valid exercises of agency authority under Section 602. The court below held that agencies do have the authority to create regulations that prohibit recipients of federal funding from engaging in actions that result in a disparate impact on the basis of race, color, or national origin. *Sandoval*, 197 F.3d at 501-02. Other courts have reached the same conclusion. *Seif*, 132 F.3d at 929. A review of this Court's precedents reveals, however, that this conclusion may be erroneous. If, as this Court has previously

held, Title VI protection extends no further than the Fourteenth Amendment, any agency regulation purporting to incorporate a disparate impact standard would be invalid. Before answering the question of whether Section 602 contemplates a private cause of action to enforce disparate impact regulations, this Court should first answer the question of whether Section 602 even allows for the promulgation of disparate impact regulations.[5]

The Fourteenth Amendment to the United States Constitution proscribes governmental conduct which has a discriminatory purpose or intent. *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264-65 (1977). A rule focusing on impact alone, and not intent or purpose, would "raise serious questions about" and threaten a "whole range of tax, welfare, public service, regulatory, and licensing statutes." *Washington v. Davis*, 426 U.S. at 248. Although this Court's most recent decision regarding the scope of Title VI makes clear that the statute

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[5] The Court can and should reach this issue. It goes to the fundamental validity of the regulations, and so is fairly implicated in the question whether a lawsuit may be filed pursuant to them. The issue was raised in Petitioners' Reply Brief (p. 6 n.3) and their supplemental filing (*see, e.g.*, p. 9: "In sum, the combination of a private right of action *and overbroad federal regulations* promise a flood of litigation against federal grantees. *Private parties will use the courts to tell grantees to do something that neither the Constitution nor federal statutes mandate.*"). Finally, the issue is likely to be raised on remand in light of Respondent's 42 U.S.C. 1983 claim–even if the Court rules, as it should, that there is no private right of action under Section 602 of Title VI–so the Court should offer some guidance to the lower courts on how to handle the issue on remand (as it did in, for example, *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 655-61 (1989)).

extends no further than the Fourteenth Amendment, *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), earlier decisions have led the lower courts to conclude that agencies may promulgate regulations that proscribe not only state action that involves discriminatory intent, but also actions having a disparate impact on the basis of race or national origin. This case presents this Court with an opportunity to clarify the scope and reach of Title VI and its regulations and establish that regulations, like the statute, may extend no further than the Fourteenth Amendment.

This Court's initial pronouncements on the subject indicated that Title VI was coextensive with the Constitution. "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 352 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's").

Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, involved a challenge by black and Hispanic police officers to written examinations used by the City of New York to make entry level appointments to the police department. 463 U.S. at 584. The challenge was brought under both Title VI and regulations promulgated pursuant to the statue. The court of appeals had determined that proof of discriminatory intent was required under both the statute and its implementing regulations. *Id.* at 584. The decision was affirmed.[6] However, five Justices rejected the

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[6] Although five Justices concluded that proof of discriminatory impact or effect was sufficient to state a cause of action, the judgment of the lower court was affirmed because Justice White

(continued...)

notion that proof of discriminatory intent was required under Title VI and its implementing regulations. Justice White explained the views of the five Justices:

> The five of us reach the conclusion that the Court of Appeals erred by different routes. JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE BLACKMUN, reasons that, although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate-impact standard are valid. *Post*, at 642-645. JUSTICE MARSHALL would hold that, under Title VI itself, proof of disparate-impact discrimination is all that is necessary. *Post*, at 623. I agree with JUSTICE MARSHALL that discriminatory animus is not an essential element of a violation of Title VI. I also believe that the regulations are valid, even assuming, *arguendo*, that Title VI, in and of itself, does not proscribe disparate-impact discrimination.

Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. at 584 n.2. Four Justices also held that the Court's decision in *Bakke,* that Title VI was coextensive with the Constitution, should control. *Id.* at 611 (Powell, J., concurring, joined by the Chief Justice, and Rehnquist, J.); *id.* at 615 (O'Connor, J., concurring) ("Because petitioners have failed to prove intentional discrimination, I would affirm the judgment of the Court of Appeals."). The Court has since made

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concluded that compensatory relief should not be awarded in the absence of proof of discriminatory intent. *Guardians Association*, 463 U.S. at 584. Justice White's view, in conjunction with the four Justices who would affirm because proof of discriminatory intent was necessary to bring an action, equaled five votes affirming the lower court's opinion.

clear that separate opinions cannot be added up to yield an opinion for the Court, *United States v. Morrison*, 120 S. Ct. 1740, 1757 (2000).

The issue was revisited, albeit indirectly, in *Alexander v. Choate*, 469 U.S. 287. In holding that a state's reduction in the number of days it would pay hospitals on behalf of Medicaid recipients did not violate Section 504 of the Rehabilitation Act of 1973, the Court reviewed its holding in *Guardians*.

> [T]he Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. at 293-94 (footnote omitted). *Alexander* did not require this Court to determine the reach of Title VI. Instead, the Court merely compared Title VI and its implementing regulations with Section 504 of the Rehabilitation Act. *Id.* at 293. To the extent that *Alexander* simply restates the holding of *Guardians* it does nothing to further the understanding of Title VI's reach and scope.

The Court did, however, return to the question of whether Title VI was coextensive with the Fourteenth Amendment in *United States v. Fordice*, 505 U.S. 717. In *Fordice* the Court was called upon to determine the proper standard to be applied in evaluating whether a public university system had complied with its obligation to dismantle a *de jure* segregated university system. Responding directly to private petitioners' argument that the state system violated a ***regulation*** adopted pursuant to

Title VI, this Court reemphasized its holding in *Bakke* that Title VI reaches no further than the Fourteenth Amendment.

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, citing a regulation to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *34 CFR § 100.3(b)(6)(i)* (1991). ***Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.*** See *Regents of Univ. of California v. Bakke, 438 U.S. 265, 287, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)* (opinion of Powell, J.); *id., at 328* (opinion of Brennan, WHITE, Marshall, and BLACKMUN, JJ., concurring in judgment in part and dissenting in part); see also *Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582, 610-611, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)* (Powell, J., concurring in judgment); *id., at 612-613* (O'CONNOR, J., concurring in judgment); *id., at 639-643* (STEVENS, J., dissenting). We thus treat the issues in these cases as they are implicated under the Constitution.

United States v. Fordice, 505 U.S. at 732 n.7 (emphasis added).

Taken together *Fordice* and *Bakke* stand for the proposition that Congress intended Title VI, and all regulations enacted pursuant to the statute, to proscribe only that conduct prohibited by the Constitution. This chain of authority, however, is not unbroken. Lower courts have looked to *Guardians* and *Alexander* to support the position that Title VI and its regulations exceed the reach of the Fourteenth Amendment and proscribe conduct which has a discriminatory impact, regardless of intent, on the basis of race and national origin. *Sandoval*, 197 F.3d at 502; *Seif*, 132 F.3d at 929. These courts have grudgingly acknowledged this Court's holding in

Fordice, but they have ultimately chosen not to follow that decision. The Court below brushed past *Fordice* by explaining that "[w]hile not altogether clear, we believe the footnote merely confirms that a Title VI suit, based on the statute alone, must prove intentional discrimination similar to an Equal Protection claim." *Sandoval*, 197 F.3d at 507 n.24. This is a curious explanation given that petitioners in *Fordice* based their claim on a ***regulation*** (34 C.F.R. § 100.3(b)(6)(i)), and not the ***statute*** alone. *Fordice*, 505 U.S. at 732 n.7.

The rule articulated by *Bakke* and *Fordice* is also consistent with the rationale underlying *Washington v. Davis*. There the Court warned that allowing an equal protection claim to proceed under a disparate impact theory would threaten, and perhaps invalidate, "a whole range of tax, welfare, public service, regulatory, and licensing statutes," *Davis*, 426 U.S. at 248. By ignoring the teachings of *Bakke* and *Fordice* and allowing Title VI actions to proceed under a disparate impact theory, lower courts have turned the statute into the weapon of choice for attacking democratically enacted social policy in the federal courts. *Larry P. v. Riles*, 793 F.2d 969, 981 (9th Cir. 1984); *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (Disparate impact challenge filed against state initiative replacing a failed bilingual education program with a more effective English-immersion system.).

This Court has acknowledged in cases like *Washington v. Davis* that the difference in disparate impact versus disparate treatment causes of action is one of kind, not just degree. Because intent is irrelevant in a disparate impact case, that cause of action is fundamentally different from a disparate treatment claim. Just as a regulator cannot ban even intentional discrimination without statutory authority, *see National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662 (1976), so it is acting ultra vires if it redefines discrimination in such a fundamental way without a statutory basis. This Court disallowed Congress'

attempt to transform a disparate treatment standard into a disparate impact standard in *City of Boerne v. Flores*, 521 U.S. 507 (1997). If Congress, which has authority to enforce the Fourteenth Amendment under Section 5, can be barred from making this transformation, then surely an agency can be as well. Especially troubling in this regard is the fact that, in the nondiscrimination context, a ban on disparate impact will often threaten not only a "whole range" of otherwise legitimate laws, but will in fact *encourage* race-consciousness and disparate treatment–the very behavior Congress sought to ban. *See Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. at 652-53; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-94 & n.2 (1988) (plurality opinion); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in judgment); Roger Clegg, *The Bad Law of Disparate Impact*, The Public Interest, Winter, 2000, at 79. Finally, the agency's rewriting of the statute raises other constitutional problems as well, since the regulations are being applied here to a state government in a manner that Congress has not approved at all, let alone approved "unequivocally," *see Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). And if Congress has given agencies such broad authority to write regulations, then problems are raised under the nondelegation doctrine, *see American Trucking Associations, Inc. v. Browner*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000), and *Browner v. American Trucking Associations, Inc.*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000).

Allowing Title VI regulations to be wielded in such an imprecise manner contravenes the intent of Congress and ignores the holdings of this Court. This Court should use this case to reaffirm the principle established in *Bakke* and echoed in *Fordice*, that Title VI, and its implementing regulations, can be extended no further than the Fourteenth Amendment.

II

THERE IS NO EVIDENCE TO DEMONSTRATE THAT CONGRESS INTENDED TO CREATE A PRIVATE CAUSE OF ACTION UNDER SECTION 602 OF TITLE VI

Separate and apart from the question of whether implementing regulations that incorporate a disparate impact standard are invalid because they exceed the reach of the Fourteenth Amendment is the question of whether an implied private right of action exists under Section 602. Determining whether an implied private right of action exists under the statute is solely a question of congressional intent. Here, neither the plain language of the statute, nor the legislative history generated by the Congress which enacted Section 602, demonstrates an intent to create a private cause of action. Absent this intent, there can be no private right of action.

This Court has consistently held that a private right of action will be found only if there exists affirmative evidence that Congress intended to create such an action. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted . . . ."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) ("[O]ur task is limited solely to determining whether Congress intended to create the private right of action . . . ."); *Suter v. Artist M.*, 503 U.S. 347, 364 (1992) ("The most important inquiry here as well is whether Congress intended to create the private remedy sought by the plaintiffs.").[7]

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[7] Focusing exclusively on congressional intent represents a doctrinal departure from the four-factor test established in *Cort v. Ash*, 422 U.S. 66, 78 (1975). Under that test courts looked to whether (1) the plaintiff was in the class for whose benefit the statute was enacted;

(continued...)

This Court has not yet had an opportunity to determine whether Congress intended to create a private right of action under Section 602. "[B]ecause Guardians did not directly address whether a private right of action exists under Title VI's implementing regulations, the issue remains unresolved." Badford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 Colum. J. Envtl. L. 1, 34 (1999) (footnotes omitted). *Accord* Jimmy White, *Environmental Justice: Is Disparate Impact Enough?*, 50 Mercer L. Rev. 1155, 1174 (1999) ("Whether a private right of action existed under the regulations was not, however, explicitly addressed in Guardians Ass'n."). A review of both the language and legislative history of Section 602 reveals no evidence that Congress intended to create a private cause of action under the statute.

The first and best evidence of congressional intent is, of course, the language of the statute itself and where the language of the statute is clear, the inquiry into legislative intent generally need go no further. In *Touche Ross* this Court

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(2) there was any explicit or implicit indication of legislative intent to create a remedy; (3) a private remedy was consistent with the purpose of the statute; and (4) the cause of action was one that is traditionally relegated to state law. The analysis set forth in *Transamerica* and *Touche Ross* makes the second *Cort* factor, congressional intent, the dispositive inquiry. *See Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) ("It could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington*, 442 U.S. at 575-76, and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 18, converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence.").

explained that the search for congressional intent to create a private right of action must begin with the language of the statute.

> Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted by SIPC and the Trustee. And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself.

Touche Ross & Co., 442 U.S. at 568 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979)); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979).

There is nothing on the face of Section 602 of Title VI indicating that Congress intended for this legislation to create a private cause of action. To the contrary, the structure and language of Section 602 shows that Congress intended that only federal agencies would enforce the provision. Section 602 provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. ***Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to***

> ***continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law: Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.*** In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1 (emphasis added).

Section 602, on its face, charges the federal government with ensuring that its rules, regulations, and orders of general applicability are adhered to by recipients of federal funding. The structure of Section 602 contemplates that the federal government, and not private plaintiffs, will ensure compliance with any requirement adopted pursuant to Section 602. The statute establishes two prongs to ensure that recipients of federal funds comply with federal mandates. Plainly, only federal agencies can enforce the first prong: termination or denial of financial assistance. The second prong, "any other means authorized by law," in isolation, could be read broadly to include injunctive relief not limited to federal agencies. However, this reading of the statute becomes impossible when

the "any other means authorized by law" language is read in the context of the statutory scheme. The provision immediately following the "any other means language" makes clear that Congress intended to place the enforcement of Section 602 exclusively in the hands of the federal government. The statute dictates that "no such action shall be taken until the department or agency concerned" has sought and failed to obtain compliance "by voluntary means." *Id.* Before a federal agency may terminate funding or assistance, the head of that department must file a report with the committees of the House and Senate which have legislative jurisdiction over the program or activity at issue. This language, as well as the structure of the statutory scheme, plainly does not envision a private right of action. Rather, the statute charges the federal agencies and departments that control the purse strings with ensuring that the departments' or agencies' rules and regulations are followed by the recipients of federal funding.

Unable to find evidence of congressional intent on the face of Section 602, lower courts have delved into the statute's legislative history in search of evidence that Congress intended to create a private right of action. These judicial expeditions have gone astray, as lower courts have erroneously looked to the legislative intent of the Congress which amended the statute in 1987, instead of the Congress which actually passed the statute in 1964. The court below did not engage in an independent review of the legislative history of Section 602. Instead, the court relied on the Third Circuit's evaluation of the statute's legislative history. *Sandoval*, 197 F.3d at 504 ("The *Seif* court then determined that an implied private right of action was supported both by Title VI's legislative scheme and legislative history."). In *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d at 936-37, the Third Circuit reviewed the legislative history surrounding the 1987 amendments to Title VI and, based solely on this evidence, concluded that there was "some" indication in the legislative

history "of an intent to create a private right of action, in satisfaction of the Cort factors." *Seif*, 132 F.3d at 934.

The court of appeals' reliance on the subsequent legislative history of the 1987 amendments conflicts with the rulings of this Court. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), required this Court to determine whether private civil liability under 10(b) of the Securities Exchange Act of 1934 extended beyond those persons who engaged in manipulative and deceptive practices to those who merely aided and abetted the violation. In an attempt to demonstrate that the Act did cover aiding and abetting liability, respondent in that case relied upon 1983 and 1988 Congressional Committee Reports. This Court rejected this attempt to use 1983 and 1988 indicia of congressional intent. "'[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.'" *Central Bank*, 511 U.S. at 185 (quoting *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989)). "In evaluating the weight to be attached to these statements, we begin with the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (quoting in part *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963)). As one commentator summarized this line of authority "[s]everal Supreme Court decisions suggest that a private right of action may be implied by courts only if the original Congress enacting a statute intended to create a private right, or a subsequent Congress explicitly amended the statute to do so." Mank, *supra*, at 44.

Lower courts searching for, and ultimately finding, evidence of an intent to create a cause of action have ignored this "oft-repeated warning" and looked ***solely*** to the legislative

history that was generated by the 1987 amendments to Title VI. In *Seif* the United States as amicus suggested, and the court agreed, that the implication of a private right of action was consistent with the legislative intent because Congress was aware of the existence of a private right of action when it amended Title VI in 1987. *Seif*, 132 F.3d at 933-34. The reasoning follows that because Congress was aware of this interpretation of Section 602, and did nothing to correct it, congressional silence on the matter constitutes acquiescence. This method of determining congressional intent is flawed for two reasons.

First, as was explained in Section I, *supra*, it is not at all clear from this Court's precedent that an implied private right of action does exist to enforce disparate impact regulations promulgated under Section 602. As the Third Circuit in *Seif* conceded, "Guardians did not explicitly address whether a private right of action exists under discriminatory effect regulations promulgated under section 602." *Seif*, 132 F.3d at 929. Hence, given the extreme uncertainty as to whether a right to bring a private cause of action under Section 602 regulations even exists, it is impossible to conclude that Congress has somehow endorsed this right.

Second, the idea of congressional acquiescence is doctrinally flawed. As this Court explained in *Central Bank*:

> Furthermore, our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. "It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation . . . ."

Central Bank, 511 U.S. at 186 (quoting in part *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)).

The lower court's search for evidence of congressional intent to create a private right of action under Section 602 is fundamentally flawed. By looking only to congressional intent surrounding the 1987 amendments to Title VI, and ignoring the intent of the Congress that enacted Section 602 as expressed in the language of the section, the lower courts have engaged in a method of determining legislative intent that has been expressly rejected by this Court. Moreover, the legislative history culled from the 1987 amendments demonstrates only an awareness that Title VI had been interpreted to allow private causes of action. The fact that individual members of Congress were aware that Title VI had received this judicial gloss and did nothing to correct this interpretation does not mean that Congress intended to create a private cause of action. *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle").

Once the legislative history generated by the 1987 amendments is removed from the equation it becomes apparent that there is no evidence that Congress intended to create a private cause of action under Section 602. First, nothing in the language or structure of that section hints that Congress intended to create a private cause of action to enforce the section. To the contrary, the words of the statute make plain that federal agencies and departments are charged with ensuring that their rules and regulations are adhered to by the recipients of federal moneys. Second, there is no legislative history indicating that the Congress that enacted the section intended to create a cause of action. Once the legislative history surrounding the amendments to the section is properly discarded, there is nothing left to support the conclusion that Congress intended to create a private cause of action under Section 602.

CONCLUSION

Respondents' attempt to challenge the Alabama English-only driver's license examination requirement must be rejected for two reasons. First, this Court's precedent establishes that Title VI and its regulations can extend no further than the Fourteenth Amendment. As a result, allegations that the state's driver's license requirement has a discriminatory effect are insufficient to state a cause of action under the regulations. Instead, as with the Fourteenth Amendment, a challenge to the state law must be predicated on a claim of intentional discrimination. Second, aside from the question of whether Title VI is coextensive with the Constitution, there is no evidence that Congress intended to create a private right of action to enforce Title VI regulations. Neither the plain language of the statute, nor the legislative history generated by the Congress that enacted Section 602, indicates that Congress intended to create a private cause of action to enforce the regulations. Instead, the structure and language of Section 602 demonstrate that federal agencies, not individual litigants, are charged with enforcing regulations promulgated under the statute.

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JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether Congress intended to create a private cause of action for unintentional discrimination by recipients of federal funds, thereby subjecting the recipients to suits by private individuals to enforce disparate impact regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964, without prior notice to the recipients and bypassing the federal agency review and enforcement process established by Congress.

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INTEREST OF AMICUS CURIAE[1]

The National Collegiate Athletic Association ("NCAA") is a voluntary, unincorporated association of more than 1,200 members, consisting primarily of public and independent colleges and universities throughout the country, which adopts and helps to enforce rules – including academic standards for athletic eligibility – governing intercollegiate athletic competition between its members. The NCAA's interest in this case stems from a lawsuit presently pending before the United States Court of Appeals for the Third Circuit, *Cureton v. NCAA*, Civil No. 00-1559. Filed on behalf of a national class of African-American student-athletes, the suit challenged the association's academic standards for freshman eligibility to participate in intercollegiate athletics, claiming that the standards for Division I colleges and universities[2] violate Title VI regulations issued by the Department of Health and Human Services and the Department of Education.[3]

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[1] The written consent of both parties accompanies this brief. Counsel for the NCAA authored the brief in its entirety. No person or entity, other than the NCAA, has made a monetary contribution to the brief.

[2] Division I membership is comprised of approximately 300 of the nation's largest colleges and universities. To qualify for Division I, these institutions must, among other things, sponsor a minimum number of sports for men and women.

[3] The regulations of the Department of Health and Human Services and the Department of Education are published at 45 C.F.R. § 80.1, *et seq.*, and 34 C.F.R. § 100.1, *et seq.*, respectively. They are similar in all material respects to the regulations at issue in the instant case.

Like the Department of Justice and Department of Transportation regulations at issue in this case, these regulations bar recipients (public or private) of federal financial assistance from using criteria that have a racially discriminatory effect.

The *Cureton* suit was not brought because African-Americans are under-represented in intercollegiate athletics. In fact, the proportion of athletic scholarships awarded to African-Americans is more than twice the size of their representation in the general student population.[4] Rather, the NCAA was sued because its Division I member institutions, acting out of concern about the exploitation of student-athletes recruited for college without regard to their prospects for graduation, have chosen to include a minimum standardized test score as a component of the standards for freshman eligibility to compete in intercollegiate athletics.

The *Cureton* case illustrates the unanticipated litigation risks to which private recipients of federal funds can be exposed if an implied private right of action for disparate impact is found to exist under the implementing regulations of Title VI. The district court in *Cureton* first upheld the existence of such an implied private right of action, and subsequently enjoined use of the minimum

[4] According to data reported by the NCAA to the Department of Education pursuant to 20 U.S.C. § 1092(e), blacks constituted 9.9% of all students enrolled at NCAA Division I institutions in the fall of 1996, but held 24.2% of the athletic scholarships awarded by those institutions (1997 NCAA Division I Graduation Rates Report, p. 625).

standardized test score component of the NCAA's Division I standards for freshman eligibility. *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999).

Just how distant the target of a disparate impact claim can be from intentional discrimination is illustrated by the history of the eligibility standards at issue in *Cureton*. In 1983, when barely one-third of Division I African-American student-athletes were graduating from college, a rule called Proposition 48 was adopted by Division I members to require that a student earn a minimum GPA of 2.0 in certain core high school courses and achieve modest minimum scores on the Scholastic Achievement Test ("SAT") or American College Test ("ACT") to be eligible for participation as a freshman in Division I intercollegiate athletics.[5] Proposition 48 declared that the classroom, and not the athletic field or arena, should be the central focus of a student's attention during freshman year if his or her objectively measured academic skills did not meet certain basic levels.

Following the adoption of Proposition 48, Division I college graduation rates for all student-athletes showed immediate improvement by more than 10%, and the most dramatic improvement – a gain of no less than 27% – occurred in the graduation rate of African-American student-athletes (up from an average of 35% in the last

[5] The minimum required test score under Proposition 48 was a combined (math and verbal) SAT score of 700, or an ACT sum score of 68. These minimums, achieved by 85% of all students who take the tests, are also embodied in Proposition 16, the current successor to Proposition 48, which was adopted in 1992.

three classes entering college *before* the implementation of Proposition 48 in 1986, to an average of 45% for the first four classes entering college *after* its implementation).[6] This was accomplished with only a moderate decrease (from 27% to 24%) in the proportion of athletic scholarships awarded to African-Americans in the same classes. As a result, the *number* of graduating African-American student-athletes at Division I schools significantly increased under Proposition 48. In 1992, the NCAA Division I members passed Proposition 16, which further tightened the freshman eligibility requirements by substituting a sliding scale index composed of standardized test scores and high school GPAs, while retaining the minimum scores and GPAs from Proposition 48.[7]

The NCAA's use of minimum standardized test scores as a component of the standards for freshman eligibility would appear to be a rare example of a program intended to raise levels of academic achievement that has actually worked. But in the arena of disparate impact claims, no good deed is assured of going unpunished. Thus, four student-athletes who failed to meet the minimum test scores requirement of Proposition 16 sued the NCAA in *Cureton* on behalf of themselves and similarly situated individuals. Under their disparate impact theory, plaintiffs did not allege that standardized

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[6] NCAA Research Report 96-01: A Longitudinal Analysis of NCAA Division I Graduation Rates Data.

[7] Under the dual index imposed by Proposition 16, the higher the student's GPA, the lower the required test score, and vice versa. In no event, however, can the test score or the GPA be below the minimums specified in Proposition 48.

tests are racially biased. Instead, they merely argued that a disproportionate share of African-American student-athletes failed to achieve the required minimum test score and were thereby rendered ineligible for competition as freshman. Thus, like Respondents in the present case, plaintiffs sought to use statistical differences to maintain that they are the victims of unintentional but unlawful discrimination.

In October 1998, the district court denied the NCAA's motion to dismiss and concluded that a private right of action could be maintained to redress claims of disparate impact under Title VI's regulations. Thereafter, the case proceeded with expensive and time-consuming discovery, cross-motions for summary judgment, and an eventual ruling by the district court that enjoined the NCAA's further use of minimum test scores because they were found not to be demonstrably related to the NCAA's admittedly legitimate goal of improving the graduation rate of student athletes. On appeal to the Third Circuit, the decision of the district court was reversed on the grounds that the applicable Title VI regulations are program-specific, and therefore do not reach the NCAA's athletic eligibility rules, which are not part of any program or activity that receives federal funds. *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999).[8] Within a few months, however, the United States Department of Education

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[8] On remand, plaintiffs sought leave to file an amended complaint alleging that the NCAA's eligibility standards constitute purposeful racial discrimination. The district court denied leave to file such an amended complaint, and plaintiffs have taken a second appeal to the Third Circuit (No. 00-1559), which was argued on November 9, 2000.

issued proposed amendments to its program-specific Title VI regulations to make them institution-wide. If adopted, these amendments would circumvent the rationale of the Third Circuit's decision in *Cureton*.

Thus the question whether Title VI of the Civil Rights Act of 1964 – legislation that prohibits only *intentional* discrimination in any program that receives federal funds – provides by implication for a private right of action to challenge alleged unintentional discrimination is of considerable importance to the NCAA and its members. If private actions for disparate impact are permitted, as held in this case by the United States Court of Appeals for the Eleventh Circuit, the consequences for admissions practices may be severe. Public and private colleges and universities (virtually all of which receive federal funds) will be exposed to the expensive burden of defending claims under Title VI whenever two allegations can be made: first, that the institution has enrolled a smaller proportion of minority students than is found in the pool of potential applicants, and second, that proportionately more minority students would be admitted if a specific minimum academic standard for admission were eliminated or lowered. The well documented racial gap in standardized test scores as well as high school grade point averages ensures that almost any selective admissions standard could be subject to a disparate impact challenge. This is not to suggest, of course, that such claims would succeed. But even if the school could ultimately prevail by providing appropriate reasons for its choice of the minimum academic standard it has selected, the burden of defending itself in litigation is certain to be substantial.

Ironically, the use of disparate impact theory in private actions under Title VI has rarely proved to be a useful tool for combating unlawful discrimination. Research discloses twenty-three other cases with appellate decisions that upheld or (in most instances simply assumed) the existence of an implied private right of action to enforce regulations under Title VI.[9] But in only *three* of those cases did plaintiffs succeed in obtaining

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[9] *New York City Environmental Justice Alliance v. Giuliani*, 214 F.3d 65 (2d Cir. 2000); *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 2762 (2000); *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999); *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1239 (2000); *Indianapolis Minority Contractors Ass'n, Inc. v. Wiley*, 187 F.3d 743 (7th Cir. 1999); *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999); *Goshen Road Environmental Action Team v. United States Dept. of Agriculture*, No. 98-2102, 1999 U.S. App. LEXIS 6135 (4th Cir. 1999) (unpublished opinion); *Caractor v. Town of Hempstead Dep't of Urban Renewal*, No. 97-9150, 1998 U.S. App. LEXIS 20186 (2d Cir. June 11, 1998) (unpublished opinion); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *judgment vacated as moot*, 119 S. Ct. 22 (1998); *Buchanan v. City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996); *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *City of Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *New York Urban League v. New York*, 71 F.3d 1031 (2d Cir. 1995); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993); *Pfeiffer v. School Bd. of Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990); *Quarles v. Oxford Municipal Separate Sch. Dist.*, 868 F.2d 750 (5th Cir. 1989); *Latinos Unidos de Chelsea en Accion (Lucha) v. Secretary of Housing & Urban Dev.*, 799 F.2d 774 (1st Cir. 1986); *United States v. LULAC*, 793 F.2d 636 (5th Cir. 1986); *Castaneda v. Pickard*, 781 F.2d 456 (5th Cir. 1986); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984); *NAACP v. Medical Center, Inc.*, 657 F.2d 1822 (3d Cir. 1981); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980).

final injunctive relief on their Title VI claims.[10] By far the most frequent outcome of private disparate impact litigation under Title VI has been that plaintiffs' claims are ultimately dismissed, but only after time consuming, burdensome and expensive litigation. The NCAA and its member institutions have a legitimate interest in avoiding such litigation if it is without any legislative basis.

SUMMARY OF ARGUMENT

This Court has repeatedly identified congressional intent as the key to determining the existence and scope of an implied private right of action under a federal statute. In the case of Title VI, that intent is readily ascertainable from the language and structure of the statute. Section 601 of Title VI is an exercise of Congress' Spending Power under the Constitution. It prohibits racial discrimination by grantees under any program or activity receiving federal financial assistance. This Court has definitively construed Section 601 as reaching only intentional discrimination, and has found an implied private right of action for redress of such intentional discrimination.

Section 602 of Title VI does not create any additional substantive rights, but merely confers power on federal agencies to effectuate the provisions of Section 601 through rules and regulations consistent with achievement of the objectives of the statute authorizing the

[10] *Buchanan v. City of Bolivar*, *Elston v. Talladega County Bd. of Educ.*, and *Larry P. v. Riles*, *supra*, note 9.

financial assistance in connection with which the action is taken. The sole remedy provided is administrative, in the form of agency termination of federal assistance to the offending recipient, or other means provided by law, with the express proviso that no such agency enforcement action may be taken without first giving the recipient the opportunity for voluntary compliance. There is no provision for any private right of enforcement of the regulations. Section 603 provides for judicial review of agency action that is taken under Section 602.

As recognized by the Eleventh Circuit Court of Appeals, this Court has not squarely determined whether an implied private right of action exists under Section 602. But the Eleventh Circuit's ruling that Title VI – which itself is limited to intentional discrimination – somehow implicitly authorizes a private right of action under disparate impact regulations that themselves provide only an administrative remedy simply cannot be reconciled with the language, structure and manifest purpose of the legislation. Whether or not administrative regulations can ever validly provide for an express private right of action for relief beyond the scope of the relief available under the enabling statute itself, it is surely improper to *imply* such a right of action in the absence of compelling evidence of a legislative intention to permit such claims. There is no such compelling evidence that Congress contemplated private enforcement of Title VI in adopting the statute, let alone private claims for disparate impact. The plain truth is that the Eleventh Circuit's conclusion, to the extent that it turns on a reading of supposed congressional intent, is an exercise in judicial legislation that is conceptually incoherent.

Finally, the beneficial impact of permitting private claims for disparate impact is dubious. As illustrated by the NCAA's experience in defending academic standards adopted in good faith by the nation's leading educational institutions, disparate impact claims frequently invite judicial second guessing of decisions that unavoidably have statistically different impacts on discrete groups of Americans. Disparate impact claims are notoriously complex and expensive to litigate, with a strikingly low rate of success. There is no warrant for concluding that Congress, in seeking to ban intentional discrimination by recipients of federal funds, intended to subject those recipients to private claims based solely on disparate outcomes.

ARGUMENT

I. CONGRESS DID NOT INTEND TO CREATE A PRIVATE CAUSE OF ACTION UNDER TITLE VI OR ITS ACCOMPANYING REGULATIONS FOR ACTS HAVING AN ALLEGED DISPARATE IMPACT.

A. Title VI Proscribes Only Intentional Discrimination

Section 601 of Title VI prohibits entities that receive federal financial assistance from discriminating on the ground of race, color or national origin. 42 U.S.C. § 2000d. In order to enforce this prohibition, Congress empowered and directed all federal agencies "to effectuate the provisions of Section [601]" through regulations. Section 602, 42 U.S.C. § 2000d-1. Section 602 details the specific procedures to be followed if an agency determines that a

recipient of federal funds violates Section 601 or an implementing regulation. On its face, the statute makes no mention of any private remedial enforcement mechanism.

This Court has consistently held that Section 601 is co-extensive with the Fourteenth Amendment in reaching only intentional discrimination. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (opinion of Powell, J.); 328 (opinion of Brennan, White, Marshall and Blackmun, J.J., concurring in judgment in part and dissenting in part) (1978); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610-11 (opinion of Powell, J., concurring in judgment, joined by Burger, C.J. and Rehnquist, J.); 612 and n.1 (opinion of O'Connor, J., concurring in judgment); 641-42 (opinion of Stevens, J., dissenting, joined by Brennan and Blackmun, J.J.) (1983); *Alexander v. Choate*, 469 U.S. 287, 294 n.11 (1985). Although the statute expressly provides only an administrative enforcement remedy, this Court has recognized – without squarely deciding the issue – the existence of a limited implied private right of action under Section 601. *Cannon v. University of Chicago*, 441 U.S. 677, 702, n.33 (1979); *see Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1994 (1998) (Title IX). Any private right implied under Section 601, however, may cover only the intentional discrimination that is prohibited by that section. *See Guardians*, 463 U.S. at 610-11 (opinion of Powell, J., concurring in judgment, joined by Burger, C.J. and Rehnquist, J.); 612 and n.1 (opinion of O'Connor, J., concurring in judgment); 641-42 (opinion of Stevens, J., dissenting, joined by Brennan and Blackmun, J.J.). Even though a majority in *Guardians* determined that Section 601 proscribed only intentional discrimination, a

separate majority of the deeply-splintered Court seemed to conclude that an agency could adopt regulations under Section 602 proscribing acts that unintentionally produced discriminatory effects.[11] Justice Marshall, writing for a unanimous Court in *Alexander*, subsequently summarized the holding in *Guardians*, as follows:

> . . . [A] two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that *Title VI itself directly reached only instances of intentional discrimination*. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that *Title VI had delegated to the agencies* in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. 287 at 293-94 (emphasis added).

The Eleventh Circuit properly recognized that this Court has never directly addressed whether a private party may seek relief against a recipient of federal financial assistance under Title VI regulations proscribing unintentional discrimination when the statute itself only

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[11] Justice O'Connor noted this anomaly and argued that such regulations "cannot validly serve as the basis for liability" because it would "proscribe conduct that Congress did not intend to prohibit." *Id.* at 615 (opinion of O'Connor, J., concurring in judgment).

proscribes intentional discrimination. But it failed to reconcile Title VI's purely administrative enforcement mechanism with the creation of a private remedy under the regulations that would wholly circumvent the administrative remedy. The existence of such a private right of action simply cannot be inferred from the text of the statute or the regulations.

B. The Plain Language Of Title VI Does Not Support The Creation Of An Implied Private Right To Enforce Unintentional Discrimination

In 1975, this Court adopted a four part test for determining whether a statute that does not expressly create a private right of action has impliedly done so:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted). This four factor analysis was applied in *Cannon* to support the finding of an implied private right of action for intentional gender discrimination under Title IX, but the subsequent opinions of this Court have consistently viewed

with skepticism the creation of additional implied rights of action under silent statutes. Rather, the Court has emphasized repeatedly that the overriding judicial goal must be the determination of congressional *intent*, using the ordinary tools of statutory construction. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) ("The central inquiry remains whether Congress intended to create either expressly or by implication, a private cause of action. Indeed the first three factors discussed in *Cort* – the language and focus of the statute, its legislative history, and its purpose, – are ones traditionally relied upon in determining legislative intent") (citations omitted); *accord Suter v. Artist M.*, 503 U.S. 347, 364 (1992) ("The most important inquiry here as well is whether Congress intended to create the private remedy sought by the plaintiffs."); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted."). In this case, the inquiry begins and ends with the statutory language.

This Court has already examined congressional intent with regard to the scope of Title VI, and concluded that Section 601 of the statute itself prohibits only intentional discrimination. While it might be argued that the Court accepted that executive agencies charged with enforcing Title VI may proscribe unintended discrimination by regulation, the authority to adopt such regulations is conferred by Section 602 and is therefore necessarily subject to the limitations of that section. The clear and unambiguous language of Section 602 demonstrates that the regulations contemplated by that section cannot form the basis of a private right of action to

challenge behavior that the statute itself does not proscribe. Section 602 authorizes the adoption of regulations that may provide for administrative termination of federal funding, but requires that an agency provide a recipient of federal financial assistance with notice of a violation and an opportunity to come into compliance. In the words of the statute:

> no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured through voluntary means.

Thus, Congress expressly limited the remedy for a regulatory violation to an administrative proceeding.

This reading of Section 602 is consistent with the fundamental contractual nature of Title VI. Only recipients of federal financial assistance must comply with its provisions. Title VI provides terms that must be included in the contract between the recipient and the federal government whereby the recipient agrees not to discriminate in exchange for the receipt of the money. As this Court has stated with respect to a similar provision in Title IX, the statute conditions "an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1997 (1998). As part of this contractual relationship under Title VI, an agency must follow the procedures set forth in Section 602 in order to take any action against a recipient. The recognition of an independent private right of action to enforce

regulations covering unintentional discrimination would bypass this contractual relationship entirely and thwart the legislative scheme adopted by Congress.

The decision in *Gebser* is directly on point. The Court there ruled that a school district recipient of federal financial assistance cannot be monetarily liable under Title IX, one of Title VI's progeny, for a teacher's alleged sexual harassment of a student unless the district had "actual notice" of, and demonstrated "deliberate indifference" to, the charges. *Gebser*, 118 S. Ct. at 1997, 1999. The Court grounded its decision on the plain language of the statute, which, like Title VI, expressly provides for an administrative remedy that contains certain procedural protections for the recipient. "[W]e generally examine the relevant statute to ensure that we do not fashion the parameters of an implied right in a manner at odds with the statutory structure and purpose." *Id.* at 1996. Both Title VI and Title IX provide for notice and opportunity for voluntary compliance *before* an agency may commence appropriate proceedings to prevent the use of federal dollars for discriminatory purposes. Neither contemplates liability in the absence of administrative action. The *Gebser* Court recognized the inconsistency of sanctioning the creation of remedies not authorized by such a statute:

> It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.

Id. at 1999.

Like the school district in *Gebser*, the Alabama Department of Public Safety, as a recipient of federal financial assistance, has not been found to have engaged in any intentional discrimination such that the statutory requirement of notice should be ignored. Therefore, the department, like the school district, is entitled to notice and an opportunity to come into voluntary compliance with the implementing regulations if the funding agency believes that it has violated Title VI.

This plain reading of the statute comports with other recent decisions of this Court that have eschewed the creation of any private liability when the text of the statute plainly suggests otherwise. In 1994, the Court refused to read aider and abettor liability into the language of section 10(b) of the Securities Exchange Act of 1934. *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994). In reaching its decision, the Court reasoned that a private plaintiff alleging violations of section 10(b) and SEC Rule 10b-5 is limited by the text of the statute:

> With respect, however, to the first issue, the scope of conduct prohibited by § 10(b), the text of the statute controls our decision. In § 10(b) Congress prohibited manipulative or deceptive acts in connection with the purchase or sale of securities. It envisioned that the SEC would enforce the statutory prohibition through administrative and injunctive actions. Of course, a private plaintiff now may bring suit against

> violators of § 10(b). *But the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b). To the contrary, our cases considering the scope of conduct prohibited by § 10(b) in private suits have emphasized adherence to the statutory language, " 'the starting point in every case involving construction of a statute.' "*

Id. at 173 (citations omitted) (emphasis added). The Court made a clear distinction between acts prohibited by the statute and acts prohibited by regulation. Therefore, there can be no private right of action under implementing regulations that proscribe conduct not contemplated by the statute.

With respect, there is no warrant for exempting civil rights legislation from scrutiny under the ordinary standards of statutory construction that are exemplified in this Court's decision in *Central Bank*. Those standards do not depend on judicial notions of desired public or private policy relating to the sensitive subject of race. The task of statutory construction is always the same: to give effect to the discernable intention of Congress in enacting the statute in question. One may legitimately question whether a regulation can ever properly provide for the private enforcement of substantive rights not conferred by the authorizing statute, but certainly the existence of such rights cannot properly be implied without the most compelling supportive legislative history. In the case of Title VI, no such history exists. Significantly, major proponents of Title VI in 1964 recognized that Section 602 did not create any substantive rights beyond those created by Section 601. *See, e.g.*, 110 Cong. Rec. 5255 (1964).

The Eleventh Circuit has cited no contemporaneous legislative history to the contrary.

Thus, the Court need not address the broader question of whether administrative regulations can ever create substantive rights not provided by the enabling statute. It is enough to recognize that the language and structure of Title VI unmistakably do not contemplate the existence of a private cause of action to challenge instances of alleged unintentional discrimination. Whether or not Congress can be said to have intended in Title VI to authorize regulations proscribing unintentional discrimination even though the statute itself does not, it simply makes no sense to *imply* a private right of action under those regulations that would circumvent the one remedy that *is* expressly contemplated by the statute and provided by the regulations.

The Eleventh Circuit's decision, if left undisturbed, will subject public and private entities receiving any amount of federal financial assistance to claims that all kinds of decisions by these entities have adversely affected a protected group. The courts will be engaged in the unenviable business of reexamining the decisions of those who are in the best positions to make such determinations. In the case of the NCAA or any of its member institutions, judges will be asked to substitute their own judgments for that of academic institutions that have balanced a number of competing interests in setting academic standards they believe are in the best interests of all student-athletes. *Cf. Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989) (warning that under some disparate impact inquiries defendants "could be haled into court and forced to engage in the expensive and time-

consuming task of defending" their practices). Congress manifestly did not intend such a result.

CONCLUSION

For all of the above reasons, the Court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit, and remand with instructions to dismiss the action with prejudice.

Respectfully submitted,

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(18)

No. 99-1908

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IN THE

Supreme Court of the United States

NOV 13, 2000

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR U.S. ENGLISH AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress intended to create a private right of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

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IN THE

Supreme Court of the United States

No. 99-1908

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF AMICUS CURIAE[1]

U.S. English is a national, non-partisan, non-profit, citizens' action group dedicated to preserving the unifying and empowering roles of a common language in America. Current membership exceeds 1.4 million nationwide.

U.S. English was established in 1983 by the Honorable S.I. "Sam" Hayakawa, noted educator and linguist, former United States Senator from California, and himself an immigrant. Senator Hayakawa's overriding concern was to ensure that English would continue to serve as an integrating

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters of such consent have been filed with the Clerk of the Court.

force among our nation's many ethnic and linguistic groups, and that it would remain a vehicle of opportunity for new Americans. In his own words, "English is the key to full participation in the opportunities of American life."

Today U.S. English consists of two independent entities: U.S. English, Inc., a tax-exempt 501(c)(4) organization, which advocates the interests of its supporters before federal and state legislatures and agencies; and U.S. English Foundation, Inc., a tax-exempt 501(c)(3) organization which disseminates information, sponsors educational programs, represents interests of official English advocates before state and federal courts, and conducts research on language issues.

U.S. English supporters recognize the importance of preserving English as our common language for our national unity, equal opportunity, and economic advancement.

SUMMARY OF ARGUMENT

The Court should reverse the holding below in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), which otherwise would create a private right of action that is both unnecessary and contrary to the congressionally established administrative enforcement scheme in Title VI. The 11th Circuit's holding that Alabama's official English drivers license testing policy violates federal law is at odds with a myriad of federal statutes and regulations that recognize, either directly or indirectly, that English is the official language of the United States. Moreover, the 11th Circuit's holding that "Title VI flatly prohibits . . . English language policies that cause disparate impact on the basis of national origin" (citing *Lau v. Nichols*, 414 U.S. 563 (1974)) contorts this Court's ruling in *Lau*, the underlying premise of which was that American citizens who do not understand English need to be taught English first in order to participate fully in public schools. Finally, the holding below that when "Spending Clause legislation functions as a quasi-contract between Congress

and the States . . . , agency regulations are accorded substantial deference in assessing whether they outline a permissible construction of a congressional statute's purpose," is contrary to the rules of construction applied in *United States v. Heth, 7* U.S. (3 Cranch) 399 (1806), and *Vermont Agency of Natural Resources v. United States*, 120 S. Ct. 1858 (2000), resolving ambiguities against Congress.

ARGUMENT

I. JUDICIAL CREATION OF A PRIVATE RIGHT OF ACTION TO ENFORCE TITLE VI DISPARATE IMPACT REGULATIONS IS UNNECESSARY AND CONTRARY TO THE CONGRESSIONALLY ESTABLISHED ENFORCEMENT SCHEME.

Whether a private right of action to enforce a statute will be recognized is ultimately a matter of congressional intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). *Amicus* offers four reasons why Congress would not have intended to allow for a private right of action to enforce Title VI disparate impact regulations: it is unnecessary, contrary to the administrative enforcement scheme established by Congress, contrary to the informal resolution process established by agency regulation to promote the congressional goal of voluntary compliance, and would jeopardize a myriad of English language rules, with which the Code of Federal Regulations is replete.

A. The Elaborate Administrative Scheme In Title VI Itself Obviates a Private Right of Action.

Congress granted Federal agencies the plenary authority both to implement and to enforce the nondiscrimination provision of Title VI of the Civil Rights Act of 1964. Section 602 of Title VI directs each Federal department and agency which provides financial assistance for a program or activity to "effectuate" the nondiscrimination provision in

Section 601 "with respect to such program or activity by issuing rules, regulations, or orders of general applicability" and "to enforce any nondiscrimination requirement by terminating or denying financial assistance to any recipient found to have failed to comply with such requirement, or "by any other means authorized by law."[2] As the Justice Department recognizes, "[p]rimary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance."[3] 28 C.F.R. §50.3(b).

While Congress did not authorize private persons to enforce the nondiscrimination provisions of Title VI in the courts, this Court has recognized an implied private right of action under Section 601 for intentional discrimination. See *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 293 (1998) (Stevens, J., joined by Souter, Ginsberg, and Breyer, JJ., dissenting) ("Title VI . . . had been interpreted to include a private right of action [for intentional discrimination]," (citing *Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979)). Two of the five Justices in the *Cannon* majority concurred, disavowing any expansion of private rights of action under Title VI. 441 U.S. at 718 (Rehnquist, J, joined by Stewart, J., concurring). Accordingly, neither was there a majority in *Cannon* nor has there apparently been one since for the proposition that Congress intended a private right of action under Title VI for unintentional discrimination.

The decision of Congress not to provide a judicial remedy for unintentional discrimination by no means leaves

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[2] 42 U.S.C. §2000d-1.

[3] *See Alexander v. Choate*, 469 U.S. 287, 293-94 (1985) ("Title VI . . . delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficient social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.").

individuals without legal recourse. Federal agencies have used their authority under Title VI to allow private persons to file administrative complaints. The U.S. Department of Transportation ("DOT"), for example, provides a complaint and investigation procedure available to private persons: "Any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary a written complaint."[4]

This DOT process allows private persons to obtain relief from discriminatory conduct. DOT may cut off financial assistance to a recipient and may direct the recipient to take affirmative steps to remedy the discrimination as a condition of future financial assistance.[5] Private persons may also file a complaint with the Justice Department ("DOJ").[6] Neither Martha Sandoval nor others in her class ever filed a complaint with DOT or DOJ, even though these avenues have always been available to them.

Because of the availability of an administrative enforcement scheme under which a private person may obtain relief, this Court need not create a private right of action to enforce the Title VI disparate impact regulation.[7]

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[4] 49 C.F.R. §21.11(b).

[5] 49 C.F.R. §21.19(f). The only remedy not provided under DOT's Title VI regulations is monetary compensation, but a monetary remedy is also not provided in the statute. In any event, the absence of a money damages remedy in an administrative enforcement scheme does not mean that a private right of action must be inferred.

[6] 28 C.F.R. §42.107(b).

[7] The lower courts have held that there is no private right of action to enforce the grant assurances Congress and the Secretary of Transportation require as a condition of receiving an airport improvement grant under the Airport and Airway Improvement Act, 49 U.S.C. §§47106, 47107, primarily because Congress created an administrative enforcement scheme, under which interested persons may seek redress.

B. A Judicially Created Right of Action Would Improperly Bypass the Conditional Authority Congress Delegated To the Executive.

Allowing a private right of action to enforce the disparate impact regulations promulgated by the U.S. Departments of Transportation and Justice would circumvent the limited authority Congress delegated to the Executive Branch. Although Congress authorized federal agencies to enforce violations of Title VI's ban on discrimination, Congress circumscribed that authority in two respects. First, an agency may find that a grant recipient discriminated on the basis of national origin only after providing notice and an opportunity for a hearing.[8] Second, grants may not be terminated or denied pursuant to such a finding until the agency notifies the House and Senate oversight committees, provides Congress with a full report of "the circumstances and grounds for such action," and waits thirty days to give Congress time to review the report.[9]

These statutory procedures are intended to ensure that an agency's finding of discrimination is well-founded and thoroughly considered. They both afford recipients basic due

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See, e.g., Northwest Airlines, Inc. v. County of Kent, 955 F.2d 1054 (6th Cir. 1992), *aff'd on other grounds*, 510 U.S. 355 (1994); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir. 1986); *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489 (11th Cir. 1985).

[8] 42 U.S.C. §2000d-1. DOT regulations provide that any finding of noncompliance must be made expressly on the record, and must be approved by the Secretary. 49 C.F.R. §§21.13(c)(2), (c)(3), 21.17(e).

[9] 42 U.S.C. §2000d-1; 49 C.F.R. §21.13(c). Moreover, "[n]o action to effect compliance with title VI of the Act by any other means authorized by law shall be taken by this Department until" the Secretary has determined that compliance cannot be secured voluntarily, the recipient is given notice of its failure and the DOT's proposed action, and ten additional days elapse during which further efforts are made at achieving compliance." 49 C.F.R. §21.13(d).

process and allow Congress the opportunity on a timely basis to conduct oversight of DOT's fealty to the intentions of Congress. Allowing private enforcement of Title VI regulations denies Congress the contemporaneous oversight role Congress demanded in Title VI and frustrates several regulatory provisions intended to ensure a fair and sound decision as well as to promote an informal resolution of the matter:

> *Cooperation and assistance.* The Secretary shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.
>
> *Investigations.* The Secretary will make a prompt investigation whenever a . . . complaint, or any other information indicates a possible failure to comply with this part. . . .
>
> *Resolution of matters.* (1) If an investigation . . . indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means whenever possible.[10]

In this case, DOT provided no assistance or guidance regarding Alabama's compliance with Title VI regulations in the administration of its drivers' tests. At no time after Alabama began administering the tests only in English did DOT provide any notice that Alabama was not in compliance with Title VI or regulations promulgated thereunder. Indeed, other than participating at the Court of Appeals through the Department of Justice, DOT has been silent throughout this proceeding. *A fortiori*, Alabama was not afforded any

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[10] 49 C.F.R. §§ 21.9(a), 21.11 (c), (d).

opportunity informally to work with DOT to resolve any concerns the Department might have.

C. Private Enforcement of Disparate Impact Regulations Would Deny Recipients DOT's Informal Resolution Process.

Before Alabama is called to task for alleged noncompliance with Title VI in administering its driver license tests, it is incumbent on DOT or DOJ in the first instance to evaluate whether Alabama's practice violates Title VI. That neither DOT nor DOJ has done so is not surprising, given the attenuated relationship between DOT's financial assistance to the Alabama Department of Transportation and Alabama's practice of conducting its driver tests only in English.[11] Moreover, this is also not surprising in light of the fact that throughout the Executive Branch of the Federal Government, Executive departments and agencies, most notably DOT and DOJ, require the use of English language in a wide variety of programs and activities.

Even if DOT or DOJ were to conclude that Alabama's practice violated either department's Title VI regulations, Section 601 of the statute itself requires the agency to notify the recipient of the noncompliance and determine whether compliance may be secured voluntarily, before taking any action against the recipient.

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[11] Alabama has questioned whether there is a sufficient nexus between the financial assistance provided the Alabama Department of Transportation and the State's administration of driver tests. Alabama has not received any federal financial assistance in support of the administration of its driver tests. *Cf.* 42 U.S.C. § 2000d-1 ("[S]uch termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found[.]").

Neither DOT nor DOJ has provided Alabama with any guidance whatsoever addressing the administration of any program which conditions a license or permit in furtherance of public health and safety on a person's English language proficiency. Likewise, there is no rule, guidance, or advice questioning the exclusive use of the English language in administering a transportation safety project or program. Appendix C of Part 21 contains a non-exhaustive list of examples illustrating the application of the non-discrimination provisions of Title VI to federally assisted programs of several modal administrations within DOT, including the Federal Highway Administration ("FHA"). The examples pertain to selection of contractors; relocation payments and relocation assistance; access to and use of public accommodations and publicly available services provided to the traveling public and business users (*e.g.*, eating, sleeping, rest, recreation, and vehicle servicing); employment practices on highway construction and other projects; and location, design, or construction of a highway. None of these FHA examples concerns State-administered public safety programs.[12]

Allowing a private right of action that bypasses the congressionally-mandated enforcement scheme deprives grant recipients of the procedural protections contained in the statute and recited above. Moreover, private enforcement of Title VI disparate impact regulations is divorced from the informal agency resolution process. Accordingly, agency efforts at achieving voluntary compliance, which are required under DOT and DOJ regulations, may well not be expended in connection with a private lawsuit. Even if DOT decides to get involved in the litigation, the requirements to seek the approval of the Secretary and to notify Congress are frustrated.

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[12] 49 C.F.R. Part 21, App. C(a)(2).

Private enforcement of Title VI disparate impact regulations would also allow private litigants to pursue enforcement in situations where the federal agency with "[p]rimary responsibility for prompt and vigorous enforcement of Title VI"[13] has elected not to do so. While DOJ may believe that the enforcement of Title VI by "private attorneys general" is a good idea, Congress deputized only departments and agencies, not private persons, to enforce the Civil Rights Act of 1964.[14] Further, there is no apparent control mechanism in Title VI or implementing regulations to ensure that such private attorneys general are not advocating an interpretation or taking an enforcement action contrary to the interests of the granting agency or of the Federal Government generally.

Finally, the carefully conditioned delegation of rulemaking and enforcement authority to Federal agencies, the absence of any express grant of a private cause of action, and the complex nature of disparate impact allegations suggest that Congress intended that Federal agencies would develop expertise and exercise sound judgment to implement Section 602, whether by rulemaking or adjudication.[15]

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[13] 28 C.F.R. § 50.3(b).

[14] The proscription on discrimination in Title VI is in Section 601, which this Court has held prohibits only intentional discrimination. *See Alexander v. Choate*, 469 U.S. at 293 (summarizing opinions in *Guardian Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983)). Disparate impact regulations are agency creatures promulgated under section 602. Even if private enforcement of the statutory ban on intentional discrimination continues to be recognized. *See Cannon v. City of Chicago*, 441 U.S. 677 (1979) (private right of action under Title IX) private enforcement of disparate impact regulations, a far more complicated matter, is unwarranted.

[15] *See Interface Group*, 816 F.2d at 14-15 (Breyer, J.) ("[T]he statute [now codified at 49 U.S.C. §40103(e), prohibiting an exclusive right at an air navigation facility] as a whole provides an administrative and judicial enforcement scheme that suggests at least some Congressional wish for an element of administrative expertise at the enforcement stage, an expertise that tends to be lost when private parties can enforce the statute directly in court.").

D. Judicial Recognition of a Private Right of Action Would Jeopardize Legitimate English Language Requirements, With Which the Code of Federal Regulations Is Replete.

Recognizing a private right of action here would lead to the anomalous result whereby a Federal grant recipient is prohibited from requiring English language proficiency as an element of a public safety program, while the Federal granting agency regularly requires such proficiency in comparable programs. Moreover, the 11th Circuit's decision allowing a challenge to Alabama's practice of conducting regular driver tests in English calls into question a myriad of English language requirements throughout the Code of Federal Regulations.

If this Court agrees with the Court of Appeals that language is a proxy for national origin – a proposition with which *amicus* strongly disagrees – it follows that English language requirements throughout the Executive Branch will be found to have a disparate impact on those who cannot read, write, speak or understand the English language. Whatever codification of *Lau* Congress is thought to have enacted in bilingual education legislation, Congress cannot fairly be said to have intended to invalidate a host of English language requirements imposed by Federal, State, and local governments in furtherance of public health and safety.

For more than two decades after the decision in *Lau* DOJ and other Federal agencies have not seen fit to repeal or relax their own English language requirements. In a small number of discrete areas, as described *infra*, Congress or an Executive agency imposed affirmative obligations to provide for certain bilingual services. But in matters that affect the

public safety English language requirements have essentially remained untouched, because English language proficiency clearly serves the public interest in health and safety.

Heretofore, the risk of invalidating State or local English language requirements was minimal, because the interpretation and enforcement of the disparate impact regulations under Title VI was entrusted to DOJ and the Executive agencies respectively, the very agencies whose body of regulations feature many explicit English language requirements and whose day-to-day dealings with private persons are conducted in English. Moreover, any inclination of an Executive agency to extend the reach of Title VI is subject to mandatory congressional oversight. However, if and when a private right to enforce disparate impact regulations is recognized by this Court, every Federal district court potentially assumes the authority to interpret and to enforce Title VI regulations at the request of private parties.[16]

The proliferation of legal proceedings unleashed by this Court's recognition of a private right of action would likely result in judicial rulings similar to the Court of Appeals opinion in this case flatly at odds with the substantive regulations of both DOJ and DOT. How is it that Alabama's English-language drivers' test is illegal, whereas facility with the English language is a DOT prerequisite to operate an aircraft or commercial motor vehicle, or to serve as an able seaman? How is it that Alabama's English-language drivers' test is illegal, whereas access to U.S. agency rulemaking and adjudicative processes, including those of the Justice

[16] Recently, DOJ issued guidance which approvingly cites the court of appeals decision in this case as a case "outside of the educational context" applying the nondiscrimination provision of Title VI to English-only rules and practices. 65 Fed. Reg. 50123, 50124 n.6 (Aug. 16, 2000). However, *amicus* is not aware of any prior DOJ or DOT order or guidance applying the disparate impact regulations to English-only requirements relating to the public health and safety.

Department – as well as to the Supreme Court of the United States – is available only to those who submit documents in English?

Neither Congress nor the agencies entrusted by Congress to enforce Section 601 by rule, regulation, or order have mandated this anomalous result. Alabama is subject to this ruling only because the lower courts: (1) granted Martha Sandoval and others in her class a private right of action; and (2) assuming the mantle of a Federal regulatory agency under Section 602, equated Alabama's English-language drivers test with national origin discrimination.

While the Court of Appeals determined that Alabama had failed to establish a public safety basis for its English-language practice, *amicus* believes this determination is contrary to reason and logic, regardless of what the lower courts thought of Alabama's showing. Driving a motor vehicle poses everyday risks to the safety of drivers, their passengers, pedestrians, and the occupants of other vehicles. The purpose of requiring would be drivers to pass a test is to reduce the risk that ignorance of the rules or the road will cause an accident. Among the rules of the road is a general rule to observe and obey traffic signs. In Alabama and throughout the United States, these signs are in English. Thus, Alabama's test for obtaining a driver's license is plainly administered in furtherance of the public safety.

A survey of the United States Code and Code of Federal Regulations would reveal more than four hundred references to the English language.[17] While some of these references

[17] These explicit references to the English language in essence reflect the universal practice in the Federal Government that all agency adjudications and rulemaking proceedings are conducted only in English. As the Sixth Circuit stated in *Frontera v. Sindell*, 522 F.2d 1215, 1220 (1975), "It cannot be gainsaid that the common, national language of the United States is English. Our laws are printed in English and our

require the Federal, State or local government, or school or private business, to make reasonable accommodations to those who cannot speak, read, or write the English language, the vast majority of them require applications, records, reports, labels, manuals, and other documents to be submitted in the English language.[18] Thus, in order for a person to participate in an agency rulemaking, seek a determination by a federal agency, or apply for a grant or permit from a federal agency, that person typically must be able to speak, read, and understand English.

Heretofore, these requirements have been upheld against challenges that the failure to provide hearings, instructions, or other notices in the language of one or more non-English speaking persons amounts to a denial of due process. In *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999), the court of appeals held that the failure of the Immigration and Naturalization Service to provide notice of the consequences of Nazarova's failure to appear on time at her deportation hearing in her native Russian did not violate due process. To hold otherwise would present:

> a broad and troublesome position: the logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of

legislatures conduct their business in English." *See* Sen. Hayakawa explaining the purposes and effects of Official English, 127 Cong. Rec. S3998-99 (daily ed. April 27, 1981) (reproduced in Appendix A).

[18] DOT's modal administrations, such as the National Highway Traffic Safety Administration ("NHTSA") and the Maritime Administration, require the English language to be used on labels, *e.g.*, 49 C.F.R. §555.9 (temporary exemption labels), and 49 C.F.R. §571.213 (child restraint systems); in petitions, *e.g.*, 49 C.F.R. §552.4 (petitions for rulemaking, defect, and noncompliance orders), in applications, *e.g.*, 46 C.F.R. §249.6(c) (application for approval of marine hull insurance underwriters), and in tariffs, *e.g.*, 14 C.F.R. §221.4 (tariffs and other documents filed with the Office of the Secretary).

> the human race, and then select the proper one for each potential deportee. No court to our knowledge has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first.

171 F.3d at 483.[19]

Moreover, where public safety is involved, three DOT modal administrations require proficiency with the English language to obtain a permit to operate a vehicle or perform a safety-related function. Even private pilots, the aviation analog to private motor vehicle operators, are required by the Federal Aviation Administration ("FAA") to "read, speak, write, and understand the English language."[20] Coast Guard regulations require "able seamen" to "speak and understand the English language as would be required in performing the general duties of an able seaman and during an emergency aboard ship";[21] other maritime personnel are subject to

[19] *See Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (failure to provide notice of seizure of currency in French rather than English did not violate due process); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983) (failure to provide notice to Social Security claimants in Spanish did not violate due process); *Frontera v. Sindell*, 522 F.2d 1215 (failure to conduct Civil Service Commission exam in language other than English did not violate Constitution).

[20] 14 C.F.R. §61.103. Title 14 of the Code of Federal Regulations requires that an applicant for the following certificates "read, speak, write, and understand the English language": instrument ratings, §61.65; private pilot based on foreign pilot license, §61.75; student pilot, §61.83; recreational pilot, §61.96; private pilot, §61.103; commercial pilot, §61.123; airline transport pilot, §61.153; flight instructor, §61.183; ground instructor, §61.213; flight engineer, §63.31; flight navigator, §63.51; air traffic control tower operator, §65.33; aircraft dispatcher, §65.53; mechanic, §65.71; repairman, §65.101; and parachute rigger, §65.113.

[21] 46 C.F.R. §12.05-3(a).

similar requirements.[22] The Federal Highway Administration ("FHwA") requires drivers of commercial motor vehicles to "read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records."[23]

Other federal agencies with authority to safeguard the public health and safety, such as the Food Safety and Inspection Service of the Agriculture Department,[24] the Consumer Product Safety Commission,[25] the Environmental Protection Agency,[26] the Food and Drug Administration,[27]

[22] *E.g.*, 46 C.F.R. §12.10-3(b) (lifeboatmen); 46 C.F.R. §12.15-3(c) (engine department personnel).

[23] 49 C.F.R. §391.11(b). Similarly, persons who transport migrant workers are subject to the same requirements. 49 C.F.R. §398.3(c). Although the FHwA announced a couple of years ago that it was reviewing this requirement in light of the potential for disparate impact, *see* 62 Fed. Reg. 45200 (1997), no decision has been forthcoming. The fact that the FHwA has authorized administration of the commercial driver's license test in foreign languages, *id.*, does not detract from the fact that the regulation imposes an English proficiency requirement.

[24] *See, e.g.*, 9 C.F.R. §§317.2(b), 381.116(a) (meat and poultry products labeling).

[25] *See, e.g.*, 15 U.S.C. §1261(p)(non-English language label on hazardous substance is "misbranded"); 15 U.S.C. §1278(c)(cautionary statement on toys and games); 16 CFR §300.7 (wood products); 16 C.F.R. §301.3 (fur products); 16 C.F.R. §303.4 (textile fiber products); 16 C.F.R. §307.5 (smokeless tobacco product warnings).

[26] Title 40 of the Code of Federal Regulations includes forty separate provisions requiring labels, reports and other information to be written in English, including 40 C.F.R. §§86.091-35, 86.092-35(a), 86.093-35, 86.094-35, and 86.095-35 (certain cars and trucks); 40 C.F.R. §156.10(a)(3)(pesticides); 40 C.F.R. §204.55-4(a)(4) (portable air compressors).

[27] *See, e.g.*, 21 C.F.R. §101.15(c)(1)(food); 21 C.F.R. §201.15(c)(1) (drugs); 21 C.F.R. §501.15(c)(1)(animal food); 21 C.F.R. §607.40(b) (blood products); 21 C.F.R. §701.2(b)(1)(cosmetics); 21 C.F.R.

and the Bureau of Alcohol, Tobacco, and Firearms,[28] all require labels, reports, and manuals to be written in English.

The DOJ Rules of Practice governing hearings involving allegations of unlawful employment of aliens, unfair immigration-related employment practices, and document fraud require that "all documents presented by a party in a proceeding must be in the English language or, if in a foreign language, accompanied by a certified translation."[29]

Similarly, the rules of this Court provide that all foreign language documents must be accompanied by an English translation.[30]

Amicus is aware of a handful of specific federal requirements, some imposed by regulation and some by statute, directing recipients of federal funds to take affirmative steps to accommodate non-English speaking persons. A survey of the limited number of bilingual programs and activities required or provided by statute or regulation confirms that not one involves matters of the public health and safety. Rather, they are limited to voting rights;[31] access to education opportunities;[32] access to

§801.15(c)(1)(medical devices); 21 C.F.R. §1010.2(b)(electrical products performance certification).

[28] *See, e.g.*, 27 C.F.R. §4.38(c)(wine); 27 C.F.R. §5.33(c)(distilled spirits); 27 C.F.R. §47.52(f)(importation of arms and ammunition).

[29]28 C.F.R. §68.7(e). Also, all submissions to DOJ required by the Foreign Agents Registration Act must be in the English language. 28 C.F.R. §5.206(a). Many agencies expressly require all written submissions to be in the English language. *See, e.g.*, 15 C.F.R. §766.6 (Bureau of Export Administration enforcement proceedings); 35 U.S.C. §361(c)(international patent applications); 17 C.F.R. §230.403(c) (SEC Regulation C registration statement)(one of 22 similar SEC requirements)

[30] Sup. Ct. R. 31 ("Translations").

[31] *See* 28 U.S.C. §§1973b, 1973aa, 1973aa-1a (requiring bilingual voting materials to limited-English proficient persons, but only in States or political subdivisions where more than 5% or more than 10,000 of

employment training opportunities;[33] access to health care services;[34] access to social security and disability programs[35]; access to other social welfare programs;[36] and access to the

voting-age citizens are members of a single language minority and are limited-English proficient). *See also* 32 C.F.R. §46.6(b)(4)(Defense Department rule requiring immediate assistance in "appropriate language" to any person in need of assistance in reading or understanding English).

[32] *See, e.g.*, Bilingual Education Act, 20 U.S.C. §7410 *et seq.*; 34 C.F.R. Part 100, App. B (vocational education remedial plans); 20 U.S.C. §1703 (failure of educational agency to take appropriate action to overcome language barriers that impede equal participation in elementary and secondary schools may constitute a denial of equal educational opportunity on account of national origin).

[33] *See., e.g.*, 29 U.S.C. §1643 (youth training program to overcome serious barriers to employment faced by persons with limited-English language proficiency).

[34] *See, e.g.*, 42 U.S.C. §1396s(c)(distribution of pediatric vaccines with respect to any population of vaccine-eligible children a substantial portion of whose parents have a limited ability to speak English); 42 U.S.C. §300u(b)(bilingual or interpretive services to improve the health of racial and ethnic minority groups); 42 U.S.C. §11707 (health care for native Hawaiians), 42 C.F.R. Parts 51 and 56 (grants for Public Health Service community and migrant health programs and services to include bilingual assistance), 42 C.F.R. §431.635(d)(3)(requiring effective information to those who cannot read or understand the English language regarding the coordination of Medicaid with the Special Supplemental Food Program for Women, Infants, and Children).

[35] *See, e.g.*, 42 U.S.C. §§403(l), 404(b), 423 (Federal Old Age, Survivors and Disability Insurance benefits (Part 404); 42 U.S.C. §1383(c) (Supplemental Security Income for the Aged, Blind, and Disabled); 29 C.F.R. §§2520.102-2(c), 2520.104b-10(e) (notice in non-English language common to plan participants who meet a minimum percentage or number of non-English language literacy in same language, offering language assistance in understanding ERISA plans and disclosure requirements); 29 C.F.R. §4011.10(e)(same for Pension Benefit Guaranty Program plans and disclosure requirements).

[36] *See, e.g.*, 42 U.S.C. §9805 (Urban and Rural Special Impact Programs of assistance to persons disadvantaged in labor market because of limited English language abilities); 7 C.F.R. §272.4(b)(bilingual

court system.[37] There is no similar specific requirement imposed by DOT or DOJ on Alabama or any other State to administer public safety programs in any language other than English or to require the granting of permits to engage in activities with potential risk to the public to those who do not read, speak, or understand English.

The generic English language provision relied upon by the Court of Appeals, 28 C.F.R. §42.405(d), is not reflected in DOT's Title VI regulations or guidance. That regulation, entitled, "Public dissemination of title VI information," requires grant recipients to take "reasonable steps" to provide foreign language assistance where a significant number or proportion of non-English language persons likely to be directly affected by a federally assisted program "need service or information in a language other than English in order effectively to be informed of or to participate in the program." Other than this case, *amicus* doubts that DOJ has relied on this regulation to challenge a State's English language proficiency requirement where the requirement serves a legitimate public health and safety interest.[38]

services to persons of single-language minority for State administration of Food Stamp program); 7 C.F.R. Part 1930, Subpart C, Exh. B (Rural Housing Service lease agreements and occupancy rules written in non-English language "common to a project area").

[37] *See* 28 U.S.C. §1827(c)(interpreters provided in court proceedings when the Director of the Administrative Office of the U.S. Courts determines a need for certified interpreters in a particular language).

[38] We also doubt this regulation would be cited by DOJ for the proposition that Alabama must administer its drivers test in each applicant's native or spoken language, given that what steps are "reasonable" depends on "the scope of the program and the size and concentration of such [non-English language] population," yet this is the clear implication of the 11th Circuit's ruling.

II. *LAU V. NICHOLS* NEEDS CLARIFICATION.

A. *Lau* Is Premised on English Being the Common Language of the United States.

Aside from the obvious safety issues involved in having licensed operators of moving vehicles capable of reading road signs and understanding directions from police, fire, and rescue officers, the importance of understanding English has always been fundamental to American life. The Court should seize this opportunity to acknowledge what the late linguistic expert Senator Hayakawa identified twenty years ago as a fundamental ingredient in the great American melting pot and "what is already a political and social reality: That English is the official language of the United States."[39]

At least half of the United States now have official English constitutional or statutory provisions; most if not all federal and state agencies customarily communicate only in English; and private employers impose English language rules in their workplaces. Although a handful of court cases would indicate otherwise, this linguistic phenomenon is the antithesis of invidious discrimination on the basis of national origin. As explained by Senator Hayakawa, the purpose of official English is "to insure that American democracy always strives to include in its mainstream everyone who aspires to citizenship, to insure that no one gets locked out by permanent language barriers."[40]

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[39] Appendix A at A1. One of the first American Presidents to recognize the need to unify this diverse Nation through our common language was none other than the author of our Declaration of Independence, who in his "Prayer for the Nation," exhorted God to "fashion into one united people the multitudes brought hither out of many kindreds and tongues." "Thomas Jefferson's Prayer for the Nation," reprinted in The Heritage Foundation Quarterly Report (Spring '99) *at* www.heritage.org/ membership/ hmn/ Spring99/ publications.html.

[40] Appendix A at A4.

The only way for an immigrant to profit from everything America has to offer is to learn our common language. The sooner the assimilation, the faster immigrants can empower themselves to function fully as members of American society. It is thus only fitting that an immigrant serves as Chairman and CEO of U.S. English.

Some opponents of official English claim that laws requiring Americans to communicate with their government in English are exclusionary. These claims turn Senator Hayakawa's empowerment purpose, which is still the guiding light of U.S. English, on its head. As this Court correctly pointed out in *Lau*, which involved Chinese-speaking residents of San Francisco receiving "fewer benefits than the English-speaking majority" from the public school system, the solution is not to teach the minority in Chinese, but to "take affirmative steps to rectify the language deficiency," *i.e.*, teach the children our common language.

When opponents of official English, and any courts that accept their arguments, suggest that official English laws are exclusionary, they send an implicit message that immigrants do not need to learn English in order to participate in the opportunities of American life. This misguided view perpetuates a language deficient underclass within the United States of America. Trapped in linguistic ghettos, those who cannot speak or read English will never be full participants in the American "melting pot" experience.

In the preface to his 1828 *American Dictionary of the English Language*, Noah Webster explained the necessity "that the people of this country . . . have an *American Dictionary* of the English Language[:] Language is the expression of ideas; and if the people of one country cannot preserve an identity of ideas, they cannot retain an identity of language." Webster predicted that "our language, within two

centuries, will be spoken by more people in this country, than any other language on earth, except the Chinese." *Id.*

In the last two centuries, English has become the global means of communication. English has more recently become the common language of the World Wide Web. English remains the key to opportunity in America. It empowers immigrants and makes us truly united as a people.

B. *Lau*'s Discussion of Remedy was Confined to the Terms of Federal Guidelines Requiring Affirmative Efforts to Train Non-English Speaking Students to Speak English.

In its brief to the Court of Appeals, the most the United States would say about the federal "law" Alabama is said to have violated was:

> Policies that require fluency in English in order to receive benefits can have a disparate impact on the basis of national origin. The Supreme Court so held in *Lau v. Nichols*, 414 U.S. 563 (1974), and the agencies responsible for implementing Title VI have consistently espoused that view in regulations and interpretive guidance.[41]

These federal "regulations and interpretive guidance" to which the United States referred below are neither express legal authority nor the "Rule of Law."[42]

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[41] Brief for the United States in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), filed January 11, 1999, at 6.

[42] In *Marbury v. Madison*, Chief Justice John Marshall stressed that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." 5 U.S. (1 Cranch) 137, 163 (1803). "Rule of Law . . . means that the government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F. von Hayek, *The Road to Serfdom* 72 (1944); *see* S. von Pufendorf, VII *De Jure Naturae et Gentuim: Libri Octo* Ch. VI, §11 (1688) (C.H. & W.A. Oldfather trans. 1934) ("Care should be taken that those who rule should govern the commonwealth according to the direction of established laws, rather than by their own private and uncircumscribed pleasure.") (Citation omitted).

The lack of express legal authority for these "regulations and interpretive guidance" is not surprising, given that English-language requirements are prevalent throughout the Federal Government. It is also not surprising, given the difficulty, if not impossibility, with crafting a remedy that accommodates the non-English speaking persons but neither compromises the public health or safety nor imposes unreasonable burdens on the grant recipient. Here, the only remedy ordered by the District Court, in an order granting a stay pending appeal, was to require Alabama to administer the driver's test in seven languages other than English.[43] If it indeed is a violation of Title VI to administer a driver's test to a non-English speaking person in English, there is no principled limit to this ruling. If there is only one person who speaks a particular language in the entire State of Alabama, or perhaps five or ten, why would they not be entitled to take the test in their own native language?[44]

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[43] The district court initially ordered Alabama to make "reasonable accommodations" to non-English speaking applicants, without specifying what accommodations would suffice.

[44] *Cf. Lau v. Nichols*, 414 U.S. at 572 (Blackmun, J., and Burger, C.J., concurring in the result)("I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.").

C. *Lau* Should Only Be Applied as Controlling Authority to Strike Down a State Law, If at All, Where There Is a Clear Congressional Statement of a Condition Sought to Be Imposed on the Receipt of Federal Funds.

"Congress attaches conditions to the award of federal funds under its spending power, U.S. Const., Art. I, §8, cl. 1[.]" *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 287 (1998). When the Court decided *Lau*, it mentioned but did not define any restrictions on the "spending power" of Congress: "Whatever may be the limits of that power, . . . they have not been reached here." 414 U.S. at 569 (internal citations omitted). Since deciding *Lau*, as discussed below, the Court has addressed "spending clause" restrictions, at least implicitly in the context of construing statutory ambiguities. *Amicus* respectfully urges the Court to clarify its ruling in *Lau* in light of its subsequent ruling that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)(citations omitted).

As there is no clear congressional statement that receipt of DOT funding forbids Alabama from offering its drivers license test only in English pursuant to its 1990 constitutional amendment mandating that "The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. . . ." [45] *Lau* cannot be controlling authority.

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[45] Ala. Const. amend. 509.

IV. WHEN SPENDING CLAUSE LEGISLATION FUNCTIONS AS A QUASI-CONTRACT BETWEEN CONGRESS AND A STATE, ANY AMBIGUITIES SHOULD BE CONSTRUED *CONTRA PROFERENTEM*, *I.E.*, AGAINST CONGRESS

The 11th Circuit's holding that when "Spending Clause legislation functions as a quasi-contract between Congress and the States . . . , agency regulations are accorded substantial deference in assessing whether they outline a permissible construction of a congressional statute's purpose," 197 F.3d at 495, is contrary to the rule of quasi-contractual statutory construction applied by this Court in *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806), that ambiguous words be construed *contra proferentem*, as well as contrary to two related rules of construction applied by this Court recently in a federalism statutory construction context. *Vermont Agency*, 120 S. Ct. at 1870.

A. Quasi-Contractual Ambiguities in Title VI Ought to Be Construed Against Congress.

Federal "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is either unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17 (citations omitted).

In *Heth*, a customs duties collector challenged the retroactive application of a statutory reduction of his commission level. The Attorney General claimed that the

new rate should apply to all duties collected after the effective date of the statute. The Customs collector claimed entitlement to the previous statutory commission level on the grounds that Congress' statutory reduction of his commission was ambiguous as to what "point in time" it should take effect. Justice Johnson explained:

> The words of the act, "arising on goods imported," although in themselves very indefinite in point of time, will receive a precise signification in this respect, by supplying the words "heretofore," to give them a past, or "hereafter," to give them a future signification. If it be necessary that the court should make an election between these words, in order to complete the sense, its choice will be immediately determined by recurring to two well known rules of construction, [namely,] that it ought to be consistent with the suggestions of natural justice, and that the words should be taken most strongly "*contra proferentem*."

7 U.S. (3 Cranch) at 409; *id.* at 413 (Paterson, J.) ("[T]he words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law makers."); *cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J. & Thomas, J., concurring in the judgment in part and dissenting in part) ("[A]ny ambiguity concerning [a preemption clause's] scope will be read in favor of preserving state power.").[46]

At least five Justices have recently reaffirmed the precedential value of *Heth*, for this Court's long-standing

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[46] *See generally Mesa Air Group, Inc. v. DOT*, 87 F.3d 498, 506 (D.C. Cir. 1996) (buttressing the appellate court's federal government-private party contractual analysis with *contra proferentem*).

recognition of "the injustice of interpreting a statute to reduce the level of compensation for work already performed," *Martin v. Hadix*, 527 U.S. 343, 368-69 (1999) (Ginsburg, J., and Stevens, J., concurring in part and dissenting in part), and for "the meaning of the 'clear statement' retroactivity rule from the earliest times." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278-88 (1994) (Scalia, J., Kennedy, J., and Thomas, J., concurring in the judgments).

In this case, the Title VI contractual language which allegedly imposes a legal proscription against implementing Alabama's official English constitutional amendment, at least with regard to drivers license testing, is reproduced in Appendix B in its entirety.[47] In summary, the grant assurance language mirrors the nondiscrimination language of Title VI, and incorporates by reference DOT's "specific requirements."

No reasonable State official would understand these grant assurances as a consensual exposure by a State to "private attorney general" lawsuits alleging disparate impact or any other form of unintentional discrimination. *Amicus* respectfully suggests that when this Court focuses on the legislative intent behind Section 602 as applied to these specific grant assurances in this case, the question presented by the Alabama Petitioners, as urgent as it is for this Court to resolve, answers itself: "The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States."

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[47] *See* 49 CFR §21.7(a)(1) ("Every application for Federal financial assistance to carry out a program to which this part applies, . . . shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by, an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part.").

Pennhurst, 451 U.S. at 16-17. "Our conclusion is buttressed by two other considerations that we think it unnecessary to discuss at any length: first, 'the ordinary rule of statutory construction' that 'if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute,' and, second, the doctrine that statutes should be construed to avoid difficult constitutional questions." *Vermont Agency*, 120 S. Ct. at 1870 (citations omitted).

B. Ambiguities in Spending Clause Legislation Should Not Be Construed to Impinge Upon Powers Reserved to the States Respectively.

The Spending Clause remains a significant exception to the rule that the Federal Government "may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). In *Pennhurst*, this Court recognized "the 'constitutional difficulties' with imposing affirmative obligations on the States pursuant to the spending power. That issue, however, is not now before us." 451 U.S. at 17 n.13 (citation omitted). At least one such unresolved "constitutional difficulty" is squarely presented in this case: "[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000); s*ee Loving v. United States*, 517 U.S. 748, 771 (1996) ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.") (citations omitted).

As of this Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), *United States v. Butler*, 297 U.S. 1 (1936),

was "the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause." 483 U.S. at 216 (O'Connor, J., dissenting). In *Butler*, Congress through the Agricultural Adjustment Act had attempted to regulate through the spending power. *See id.* The Court's analysis in *Butler* came down to a fundamental federalism analysis, equally applicable in this case: "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." 297 U.S. at 63.

In dissent in *South Dakota*, Justice O'Connor, while "subscrib[ing] to the established proposition that the reach of the spending power 'is not limited by the direct grants of legislative power found in the Constitution,'" 483 U.S. at 212-13 (quoting *Butler, 297 U.S. at 66*), also identified two essential attributes of a legitimate exercise of the spending power: "the conditions imposed must be unambiguous"; and "the statute is entirely unambiguous." 483 U.S. at 213 (citations omitted). In this case, both the conditions and the statute are at best ambiguous. Neither Title VI nor the DOT's implementing regulations even hint that Alabama's English-only drivers license testing policy violates Title VI.

The only Federal regulations arguably unambiguous on this issue are EEOC's "English-only rule Guidelines,"[48] guidelines that the 9th Circuit rejected in *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993), and the 4th Circuit has called into question.[49]

The Court applied its *Butler* federalism analysis to strike down the Low-level Radioactive Waste Policy Amendments of 1985 as crossing the "line distinguishing encouragement

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[48] 29 C.F.R. §1606.7(a).

[49] *Long v. First Union Corp. of America*, 894 F. Supp. 933 (E.D. Va. 1995) ("This Court . . . does not find the language of Title VII supportive of the EEOC's conclusion."), *aff'd* 86 F.3d 1151 (4th Cir. 1996).

from coercion." *New York v. United States*, 505 U.S. 144, 175 (1992). "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require States to regulate." *Id.* at 178.

Although *Butler* and *New York* both involved coercive acts of Congress, the *Butler/New York* analysis applies equally to coercive acts of federal agencies and courts: "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people" 297 U.S. at 63 (*quoted in* 505 U.S. at 157); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) ("[T]he framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. . . . [C]ourts, as well as other departments, are bound by that instrument."). *Amicus* respectfully suggests that the people have never given the Federal Government the power to frustrate Alabama's efforts to empower all of its citizens through nondiscriminatory policies that encourage facility in our common language, English, such as the State constitutional provision and sound policies underlying Alabama's English language drivers license testing practice.

CONCLUSION

Accordingly, this Court should reverse the 11th Circuit.

Respectfully Submitted,

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November 13, 2000

APPENDICES

APPENDIX A

SENATOR S.I. HAYAKAWA ON THE PURPOSE AND EFFECTS OF OFFICIAL ENGLISH
27 CONG. REC. S3998-99
(DAILY ED. APRIL 27, 1981)

[L]anguage is a powerful tool. A common language can unify; separate languages can fracture and fragment a society. The American "melting pot" has succeeded in creating a vibrant new culture among peoples of many different cultural backgrounds largely because of the widespread use of a common language, English.

Learning English has been the primary task of every immigrant group for two centuries. Participation in the common language has rapidly made available to each new group the political and economic benefits of American society. Those who have mastered English have overcome the major hurdle to full participation in our democracy.

Today I am introducing a constitutional amendment declaring as the law of the land what is already a political and social reality: That English is the official language of the United States.

This amendment is needed to clarify the confusing signals we have given in recent years to immigrant groups. For example, the requirements for naturalization as a U.S. citizen say you must be able to "read, write, and speak words in ordinary usage in the English language." And though you must be a citizen to vote, some recent legislation has required bilingual ballots in some areas. This amendment would end that contradictory, logically conflicting, situation.

Bilingual education programs were originally designed to help non-English-speaking children learn English quickly so they could join the mainstream of education and of our society. The Carter administration attempted to substantially

broaden this mandate by proposing requirements for schools to teach other academic subjects entirely in students' native language.

I am proposing this amendment because I believe that we are being dishonest with the linguistic minority groups if we tell them they can take full part in American life without learning the English language. We may wish it were otherwise, but it simply is not so. As the son of an immigrant to an English-speaking country, I know this from personal experience. If I spoke no English, my world would be limited to the Japanese-speaking community, and no matter how talented I was, I could never do business, seek employment, or take part in public affairs outside that community.

Let me explain what the amendment will do, upon its passage by Congress and ratification by three-fourths of the States:

It will establish English as the official language of State, Federal, and local government business;

It will abolish requirements for bilingual election materials;

It will allow transitional instruction in English for non-English speaking students, but do away with requirements for foreign language instruction in other academic subjects;

It will end the false promise being made to new immigrants that English is unnecessary for them.

On the other hand, and this is important, there are things the amendment will not do:

It will not prevent the use of any other language within communities, churches, or cultural schools.

That is, Yiddish schools, Hispanic schools, Japanese, and Chinese schools are perfectly all right insofar as their support by local communities, but not by the taxpayer.

It will not prevent the use of second languages for the purpose of public convenience and safety, for example on signs in public places, but it will not allow governments to require multilingual postings or publications.

I am thinking, Mr. President, of such signs as you see in the street sometimes, "Danger, construction area." If this sign is put up in a building lot in Chinatown, let us say, there is certainly no objection whatsoever to putting signs to that effect in Chinese or any other language that is appropriate for the passerby. So, for purposes of public convenience and safety, other languages may be used wherever necessary. I think that what we have, in Washington, Los Angeles, and San Francisco, street signs in Chinese or Japanese, are perfectly acceptable, because they are also accompanied by street signs in English. They are also acceptable because they give a cosmopolitan flavor to those cities that have them and we are proud of the fact that we are a cosmopolitan culture.

My amendment, Mr. President, will not prevent public schools from offering instruction in other languages, nor will it prevent schools and colleges from requiring some study of a foreign language.

Incidentally, Mr. President, we are crippled in international relations because of our imperfect command not only of the well known languages like Spanish, French, German, or Italian, but we have very few speakers of Chinese, Japanese, Russian, Hungarian, Arabic, Thai -- some languages some people here ought to know so they can serve our Nation intelligently in diplomatic service or in trade. If we have a huge trade deficit vis-à-vis Japan, for example, it is because they have some Japanese salesmen speaking

English in New York, Chicago, Los Angeles, and elsewhere, but we have very, very few Japanese-speaking Americans doing a selling job in Tokyo or Osaka.

So, at the same time that I declare English to be the official language of the United States, I am not trying to discourage foreign language studies.

The ability to forge unity from diversity makes our society strong. We need all the elements, Germans, Hispanics, Hellenes, Italians, Chinese, all the cultures that make our Nation unique. Unless we have a common basis for communicating and sharing ideas, we all lose. The purpose of this proposal is to insure that American democracy always strives to include in its mainstream everyone who aspires to citizenship, to insure that no one gets locked out by permanent language barriers.

APPENDIX B

"General Provisions for MCSAP Agreement"
Grant Agreement between the Federal Highway Administration and Alabama Department of Public Safety
(Exhibit I to Alabama Summary Judgment Memorandum)

10. Civil Rights Act: The recipient shall comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352), and in accordance with Title VI of that Act, no person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied that benefits of, or be otherwise subjected to discrimination under any program or activity for which the recipient received Federal financial assistance and shall immediately take any measures necessary to effectuate this Agreement. It shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) prohibiting employment discrimination where:

(a) The primary purpose of and instrument is to provide employment, or

(b) Discriminatory employment practices will result in unequal treatment of persons who are or should be benefiting from the grant-aided activity.

11. Nondiscrimination: The applicant/recipient hereby agrees that, as a condition to receiving any Federal financial assistance from the Department of Transportation, it will comply with Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. 2000d), related nondiscrimination statutes, and applicable regulatory requirements to the end that no person in the United States shall, on the grounds of race, color, national origin, sex, handicap or age, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any

program or activity for which the applicant/recipient receives Federal financial assistance. The specific requirements of the United States Department of Transportation standard Civil Rights assurances with regard to the States' highway safety programs (required by 49 CFR 21.7 and on file with the U.S. DOT) are incorporated in this grant agreement.

DEC 13 2000

No. 99-1908

IN THE
Supreme Court of the United States

JAMES ALEXANDER, *in his official capacity as the Director of the Alabama Department of Public Safety*, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,
Petitioners,

v.

MARTHA SANDOVAL, *Individually and on Behalf of All Others Similarly Situated,*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN JEWISH COMMITTEE, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS
(Additional *Amici* Listed Inside)

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December 13, 2000

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QUESTION PRESENTED

Whether disparate impact regulations adopted by federal agencies to effectuate Title VI of the Civil Rights Act of 1964 are enforceable by private litigants in actions for declaratory and injunctive relief?

ADDITIONAL *AMICI*

Anti-Defamation League

Connecticut Women's Education And Legal Fund, Inc.

Council Of The Great City Schools

Girls Incorporated

National Organization For Women Foundation

National Partnership For Women & Families

Now Legal Defense And Education Fund

Title IX Advocacy Project

Trial Lawyers For Public Justice, P.C.

Women Employed

Women's Law Project

Women's Sports Foundation

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are organizations committed to the elimination of discrimination on the basis of gender, race, or national origin through effective enforcement of the civil rights laws. *Amici* submit this brief to address the important issue of whether disparate impact regulations adopted to effectuate Title VI of the Civil Rights Act of 1964 are privately enforceable in actions for declaratory and injunctive relief. Descriptions of *amici* and their membership are set forth in Appendix A.

STATEMENT

A. FACTUAL BACKGROUND.

Until 1991, Alabama – like almost every other State – administered the written portion of its driver's license exam in several foreign languages. During this time, as officials of the Alabama Department of Public Safety ("the Department") testified, the Department did not experience any significant problems in administering the foreign language examinations, either in terms of the costs of doing so or the integrity of the exam process. Pet. App. 168a. Translations of the examination into foreign languages were produced at no cost to the Department, and the Department undertook to develop new foreign language examinations if the demand was great enough. *Id.* Nor was there any evidence that non-English speaking drivers in Alabama posed a greater safety risk than English-speaking drivers. *Id.* at 168a-169a.

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[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

This long-standing practice abruptly ended following the ratification in 1990 of Amendment 509 to the Alabama Constitution, which establishes English as the official language of the State and requires officials of the State to "take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced." Pursuant to Amendment 509, the Department adopted an English-only policy with respect to the driver's licensing process, requiring all phases of the process, including the written exam, to be conducted in English. Non-English speaking applicants taking the exam are not allowed to use translators, translation dictionaries, or other interpretive aids. Pet. App. 170a-171a.

At the same time that Alabama requires non-English speaking applicants to take the written exam in English, it "render[s] substantial aid, and provide[s] substantial assistance above and beyond the standard examination procedure for illiterate and handicapped English speaking applicants." Pet. App. 175a. For example, the Department administers oral examinations for illiterate applicants and administers videotaped sign language examinations for hearing-impaired applicants. *Id.* at 179a-180a. In addition, Alabama allows non-English speakers who hold valid driver's licenses from other States or foreign countries to either drive in Alabama with their foreign licenses, or exchange them for Alabama licenses without taking either the written or performance exam. *Id.* at 185a.

B. PROCEEDINGS BELOW.

The instant suit was filed against the Department and its Director on December 31, 1996 by Martha Sandoval, on her own behalf and as representative of the class of Alabama residents who are otherwise qualified to obtain a driver's license but cannot do so because they are not sufficiently fluent in English. The plaintiffs asserted claims under 42 U.S.C. §§ 1981 & 1983, the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act

of 1964, 42 U.S.C. §§ 2000d, *et seq.*, and its implementing regulations, alleging that the Department's English-only policy with respect to the driver's licensing process violated their right to be free from discrimination on the basis of national origin. They sought a judgment declaring the Department's policy to be unlawful and unconstitutional and an injunction prohibiting its enforcement.

After a bench trial, the District Court ruled in plaintiffs' favor. In addressing various threshold issues, the District Court rejected defendants' argument that plaintiffs lacked a private right of action to enforce Title VI's disparate impact regulations. Pet. App. 82a-117a.

On the merits, the District Court held that the Department's English-only policy had a disparate impact on the basis of national origin.[2] It entered an injunction prohibiting the Department's enforcement of the English-only policy pursuant to Title VI and ordered the Department "in conjunction with the Plaintiffs, [to] fashion proposed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses." Pet. App. 252a-253a.

The Eleventh Circuit affirmed the District Court's ruling that there is an implied private cause of action to enforce disparate impact regulations promulgated pursuant to Title VI.[3] The court of appeals noted that it had recognized an

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[2] At trial, the District Court granted the defendants' motion for judgment as a matter of law on plaintiffs' claims of intentional discrimination "with the full agreement of the Plaintiffs." Pet. App. 247a. The District Court also granted defendants' motion for summary judgment on plaintiffs' Section 1981 claims on the ground that they were duplicative of their Section 1983 claims. Pet. App. 5a-6a; *but see* Sandoval Brief in Opposition to Petition for Certiorari at 3 (noting that district court "ultimately reserved ruling on ... Equal Protection" claim).

[3] The Eleventh Circuit also rejected the State's arguments that the instant lawsuit is barred by the Eleventh Amendment and that the District

implied private cause of action to enforce Title VI disparate impact regulations in three prior cases. Pet. App. 38a-40a. It further noted that its position was consistent with that of at least eight other courts of appeals. *Id.* at 40a-41a. Although acknowledging that this Court "has yet to squarely answer the question," it concluded that a "close reading" of *Lau* v. *Nichols*, 414 U.S. 563 (1974), *Guardians Association* v. *Civil Service Commission of New York*, 463 U.S. 582 (1983), and *Alexander* v. *Choate*, 469 U.S. 287 (1985), "necessarily establishe[d] several holdings logically supporting an implied private cause of action under section 602 of Title VI." Pet. App. at 42a.

SUMMARY OF ARGUMENT

I.

This Court should reject Petitioners' invitation to disrupt settled law in two significant areas of federal civil rights enforcement. In the 36 years since Title VI of the Civil Rights Act of 1964 was enacted, both the private right of action to enforce § 601 of the Act against public as well as private recipients of federal financial assistance and the disparate impact regulations adopted to "effectuate" § 601 have become well-established elements of the federal civil rights enforcement scheme.

Since this Court's decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), the availability of a federal court private right of action to enforce the federal rights created by § 601 against both public and private recipients of federal financial assistance has been firmly established. In the three decades since Title VI was enacted, Congress consistently has acted on the premise that a federal court private right of action to enforce the federal rights created

---

Court erred in concluding, on the merits, that the State's English-only policy for driver's license exams has a disparate impact on the basis of national origin. Those rulings are not at issue here.

under § 601 was available. In enacting Title IX of the Education Amendments of 1972, Congress acted on the premise that there was a private right of action under Title VI. Section 718 of the Education Amendments of 1972, which authorized federal courts to award attorney's fees in private actions against public education agencies "explicitly presumes the availability of private suits to enforce Title VI in the education context." *Cannon*, 441 U.S. at 699 & n.26. The Civil Rights Attorneys Fees Act of 1976 authorizes an award of attorneys fees to prevailing parties in actions to enforce Title VI. The Rehabilitation Act Amendments of 1986, which abrogate the States' Eleventh Amendment immunity under Title VI and other civil rights statutes, confirm the availability of a private right of action to enforce Title VI against State recipients of federal financial assistance. Finally, throughout the debates on the legislation that became the Civil Rights Restoration Act of 1987, Congress confirmed its understanding and acceptance of the well-established private right of action to enforce Title VI against recipients of federal financial assistance.

The disparate impact regulations have been a part of the civil rights enforcement scheme almost from the beginning. Those regulations are reasonable, properly adopted pursuant to an express delegation of authority to "effectuate" § 601, and have the force and effect of law. See *Alexander*, 469 U.S. at 293 (explaining the Court's previous holding that "Title VI itself directly reached only instances of intentional discrimination," but "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI").

Congress expressly authorized federal agencies to adopt appropriate regulations to "effectuate" § 601 of Title VI. This Court has concluded that § 601 directly reaches only intentional discrimination. As a condition of federal financial assistance, however, the agency disparate impact regulations impose limited obligations reasonably necessary to effectuate

§ 601. Direct proof of intentional discrimination is seldom available, and the distinction between intentional discrimination and "disparate impact" is not always clear. A policy or practice that disproportionately and adversely affects a racial or ethnic group, adopted with knowledge of its likely disparate effects, may evidence intentional discrimination. Absent sufficient justification, knowing adoption of a policy or practice that produces discriminatory effects might well support an inference of intentional discrimination.

Given the difficulties of proving intentional discrimination without direct evidence, there is a risk that some intentional discrimination will remain concealed. For this reason, it is reasonable for federal agencies to require recipients of financial assistance to avoid unjustified practices that have the effect of discriminating on the basis of race, color, or national origin. In effect, the regulations require recipients of federal financial assistance to steer clear of any policy or practice that approaches intentional discrimination of the sort directly proscribed by § 601 as a condition of receiving federal financial assistance. No State is required to accept federal financial assistance. If a State chooses to do so, however, the disparate impact regulations impose reasonable obligations to effectuate the requirements of § 601. The regulations create an appropriate margin of safety to assure that federal tax dollars are not used to finance programs that effectively exclude participation on the basis of race, color, or national origin.

Shortly after Title VI was enacted, the Department of Justice, which participated in drafting Title VI, also drafted model regulations reflecting its contemporaneous view of the conditions appropriate to effectuate § 601. The model regulations incorporated a disparate impact standard. Federal agencies responsible for administering financial assistance programs promptly adopted regulations to implement Title VI based on the model regulations, which incorporated the disparate impact standard. In the intervening three decades,

effectuating regulations adopted throughout the Executive Branch of the federal government have incorporated the disparate impact standard. In consideration of federal financial assistance under a host of programs, public and private recipients voluntarily have assumed a duty to comply with the disparate impact regulations by avoiding unnecessary practices or policies that have the effect of discriminating on the basis of race, color, or national origin.

For decades, Congress has acquiesced in the disparate impact regulations adopted to effectuate Title VI as well as the parallel language of Title IX relating to discrimination on the basis of sex. In 1975, Congress considered disparate impact regulations proposed to effectuate Title IX. Pursuant to a statutorily prescribed "laying before" procedure, the regulations implementing Title IX were submitted to Congress for review before they became effective. Congress permitted the Title IX disparate impact regulations to become effective without change. Similarly, during consideration of legislation that became the Civil Rights Restoration Act of 1987, opponents of the legislation argued that broadening the reach of Title VI and Title IX would have far-reaching consequences precisely because of the disparate impact regulations. Yet, Congress took no action to limit the regulations or disapprove them as inappropriate conditions for federal financial assistance.

II.

Disparate impact regulations can be enforced in a private right of action for equitable relief. The standard for determining whether federal regulations can be enforced in a private right of action implied under Title VI should be no more stringent than that used for determining whether such regulations can be enforced in an express private right of action under 42 U.S.C. § 1983.

Whether the private right of action is express, as under § 1983, or implied under Title VI, Congress has provided a

remedy authorizing a person to seek enforcement of Title VI rights in a federal court. For that reason, the separation of powers issues raised by implying a private right of action in the first instance are not implicated in this case, and there is no question of jurisdiction or judicial power. Here, the issue is simply whether the disparate impact regulations can be enforced in the private right of action that Congress has authorized.

If the disparate impact regulations create federal rights enforceable under Title VI, they should be presumptively enforceable in a private right of action that Congress has authorized. As in the § 1983 context, therefore, unless there is some indication that Congress intended to foreclose private enforcement of the regulations, equitable relief to compel compliance in an appropriate case should be available.

In determining whether a particular statute or regulation is a "law" that can be enforced in a § 1983 action, this Court has identified three relevant considerations: *first*, whether the language of the statute or regulation creates an enforceable federal right for the benefit of the plaintiff (*i.e.*, whether the statute or regulation imposes a duty that is not too vague or amorphous to be enforced by a federal court); *second*, whether Congress expressly foreclosed private enforcement; *third*, whether private enforcement would be inconsistent with a comprehensive alternative enforcement scheme established by Congress.

Applying the § 1983 analytic framework in this analogous context leads to the straightforward conclusion that the disparate impact regulations can be enforced in a private right of action for equitable relief under Title VI. First, the disparate impact regulations create a federal right. As an express condition of federal financial assistance, the regulations require recipients of federal financial assistance to assume a duty to refrain from using unnecessary practices that have the effect of discriminating on the basis of race, color, or national origin. Thus, the regulations establish a correlative

right of every person in the United States to participate in programs financed with federal tax dollars free from the burdens of unnecessary practices that have the effect of discriminating on the basis of race, color, or national origin. Second, there is no evidence Congress intended to foreclose private enforcement of the disparate impact regulations. Third, private enforcement of the disparate impact regulations will not interfere with the administrative enforcement scheme prescribed in § 602.

As requirements imposed only as a condition of federal financial assistance, the disparate impact regulations provide an appropriate basis for equitable relief, which would not include damages. See *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). Petitioners' reliance on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is entirely misplaced. The duty to comply with the requirements of the disparate impact regulations is unambiguous and longstanding; the regulations indisputably can be enforced by administrative action. The prospect of private enforcement has been clear since this Court's 1973 decision in *Lau* v. *Nichols*. Moreover, whether Alabama anticipated the result in this case or not, the plaintiffs seek nothing more than prospective compliance with the requirements of the regulations, as construed by the district court and the court of appeals. If Alabama believes the obligation to offer its written driving test in languages other than English is unreasonably burdensome, it can forgo federal financial assistance and avoid the obligation entirely. Alabama cannot, however, take the money and ignore the obligation.

Title VI, Title IX, and other similar civil rights statutes, as well as the disparate impact regulations adopted to effectuate them, have contributed significantly to the increased participation in all aspects of our society by those protected by these laws. Effective federal civil rights enforcement is vital to continued progress toward full participation.

ARGUMENT

I. THE PRIVATE RIGHT OF ACTION TO ENFORCE TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND THE DISPARATE IMPACT REGULATIONS ARE WELL-ESTABLISHED ELEMENTS OF THE FEDERAL CIVIL RIGHTS ENFORCEMENT SCHEME.

In the 36 years since the Civil Rights Act of 1964 was enacted, the private right of action to enforce the requirements of Title VI against all recipients of federal financial assistance and the disparate impact regulations have become well-established elements of the federal civil rights enforcement scheme – accepted as appropriate throughout the Executive Branch and by Congress, by the lower federal courts, and by recipients of federal financial assistance. The Court should reject Petitioners' invitation to disrupt well-settled principles of law governing these two important elements of federal civil rights enforcement.

A. The Private Right Of Action To Enforce Title VI Against Both Public And Private Recipients Of Federal Financial Assistance Is Well-Established.

Section 601 of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Since this Court's decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1977), the availability of a federal private right of action to enforce federal rights created under § 601 of the Civil Rights Act of 1964 ("Title VI") in a federal court has been firmly established.

In *Cannon* the Court held that Congress intended a private right of action to enforce the requirements of § 901 of the

Education Amendments of 1972 ("Title IX"). The Court explained that the language of Title IX "explicitly confer[red] a benefit on persons discriminated against on the basis of sex," 441 U.S. at 694, the plaintiff in that case was a member of the "class for whose special benefit the statute was enacted," *id.*, and therefore "the first of the four factors identified in *Cort* [v. *Ash*, 422 U.S. 66 (1975)] favors the implication of a private right of action." *Id.* at 693-94. The pertinent language of Title VI is identical to the language of Title IX, "[e]xcept for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI." *Id.* at 694-95. Indeed, "Title IX was patterned after Title VI of the Civil Rights Act of 1964." *Id.* at 694.

The second *Cort* factor supported implication of a private right of action. The Court found compelling evidence that Congress intended Title IX to be enforced in private actions in federal courts in the same way Congress understood Title VI was enforced. *Id.* at 703 ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination").

The third *Cort* factor is whether private enforcement is consistent with the purposes of the legislation. "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Id.* at 704. The Court found that an implied private right of action was consistent with the administrative fund termination scheme established in Title IX. Because of the severity of fund termination, the Court explained, a private right of action was a useful and potentially more efficient supplement to the administrative scheme. *Id.* at 704-06.

The fourth *Cort* factor also favored implication of a private right of action under Title IX. Sex discrimination – like discrimination on the basis of race, color, and national origin, addressed in Title VI – traditionally has not been the exclusive concern of the States. On the contrary, "[s]ince the Civil War, the Federal Government and the federal courts have been the "'*primary* and powerful reliances'" in protecting citizens against such discrimination." *Id.* at 708 (citations omitted, emphasis added).

The respondent in *Cannon* agreed that the virtually identical provisions of Title VI and Title IX should be construed in the same way, but argued that no private right of action had been intended under Title VI. *Id.* at 710. Although noting "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was," *id.* at 711, the Court rejected the argument on the merits. After a careful review of the legislative history of Title VI, the Court found no evidence "that any member of Congress voted in favor of the statute in reliance on an understanding that Title VI did not include a private remedy." *Id.* at 716; see *id.* at 710-16. *Cannon* thus established the availability of a private right of action under both Title IX and Title VI.[4]

In the 36 years since the Civil Rights Act of 1964 was enacted, Congress consistently has acted on the presumption that there was a private right of action under Title VI. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 72 (1992), this Court explained that the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7,

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[4] Not surprisingly, therefore, the lower federal courts consistently have assumed the availability of a private right of action under Title VI. *See, e.g., Buchanan* v. *City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996); *New York Urban League, Inc.* v. *New York*, 71 F.3d 1031 (2d Cir. 1995); *United States* v. *LULAC*, 793 F.2d 636, 648-49 (5th Cir. 1986); *Bryan* v. *Koch*, 627 F.2d 612, 616 (2d Cir. 1980).

which abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, "cannot be read except as a validation of *Cannon*'s holding" that a private right of action for damages is available under Title IX. Justice Scalia emphasized the point: "The Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7(a)(2), must be read, in my view, not only 'as a validation of *Cannon*'s holding,' but also as an implicit acknowledgment that damages are available." *Id.* at 78 (citation omitted). The same is clearly true with respect to Title VI.

Long before the Rehabilitation Act Amendments of 1986, however, the premise that there was a private right of action to enforce the requirements of Title VI in federal courts against public and private recipients of federal financial assistance had been affirmed by Congress on many occasions. For example, Section 718 of the Education Amendments of 1972, 20 U.S.C. § 1617 (repealed 1979), which authorized federal courts to award attorneys fees to the prevailing parties in private actions against public education agencies to enforce Title VI in the context of elementary and secondary education, "explicitly presumes the availability of private suits to enforce Title VI in the education context." *Cannon*, 441 U.S. at 699; see *id.* at 699 n.26. As described above, in enacting Title IX, Congress expressly presumed that a private right of action was available under Title VI.

The Civil Rights Attorneys Fees Awards Act of 1976 authorizes an award of fees to prevailing parties in actions to enforce Title VI. 42 U.S.C. § 1988. The Senate Report accompanying the attorneys fees statute confirms Congress' understanding that private enforcement of Title VI was not only available, but essential to the effective enforcement of the civil rights laws: "All of these civil rights laws [including Title VI] depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important

Congressional policies which these laws contain." S. Rep. No. 94-1011, at 2 (1976), *quoted in Cannon*, 441 U.S. at 685-86 n.6.[5]

Throughout the four-year debate on what became the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28, Congress reiterated and confirmed its understanding that there was a private right of action under Title VI, Title IX, and § 504 of the Rehabilitation Act. *E.g.*, H.R. Rep. No. 98-829, pt. 1, at 33, 35 (1984).[6]

B. The Disparate Impact Regulations Are Valid And Well-Established.

Contrary to the suggestion in Petitioners' Brief (at 26-27), the validity of the disparate impact regulations is not before the Court in this case. The issue was not raised in or decided by the court of appeals; nor is it fairly encompassed by the question presented in the petition for writ of certiorari. Accordingly, the Court need not address the validity of the regulations. See, e.g., *Blessing* v. *Freestone*, 520 U.S. 329,

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[5] *See Cannon*, 441 U.S. at 686-87 n.7 (quoting 122 Cong. Rec. 31472 (1976) (Sen. Kennedy)) ("It is Congress[']] obligation to enforce the 14th amendment by eliminating entirely such forms of discrimination, and that is why both title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 have been included [in the amendment to § 1988]. As basic provisions of the civil rights enforcement scheme that Congress has created, it is essential that private enforcement be made possible by authorizing attorneys' fees in this essential area of the law.") (alterations in original).

[6] It is not entirely clear, but Petitioners seem to concede (albeit grudgingly) that it is far too late in the day to question the availability of a private right of action under Title VI against State and private recipients of federal financial assistance. *See* Brief for Petitioners at 45 ("*Cannon* suggested, without deciding the issue, that Section 601 of Title VI permits an implied right of action for intentional-discrimination claims. The *Cannon* suggestion also *may have been* codified in the Rehabilitation Act Amendments of 1986....") (emphasis added; citations omitted).

340 n.3 (1997) ("We decline to address ... questions which ... were not presented in the petition for certiorari.").[7]

In any event, the disparate impact regulations are valid and enforceable. See *Alexander*, 469 U.S. at 293; *Guardians*, 463 U.S. at 584 n.2, 607 n.27 (White, J.); *id.* at 623 n.15 (Marshall, J., dissenting); *id.* at 642-45 (Stevens, Brennan, and Blackmun, JJ., dissenting). Congress expressly "authorized and directed" "[e]ach Federal department and agency ... empowered to extend Federal financial assistance to any program or activity" to adopt "rules, regulations, or orders of general applicability ... consistent with achievement of the objectives of the statute authorizing the financial assistance" "to effectuate" § 601 of the Civil Rights Act of 1964 "with respect to such programs or activity." 42 U.S.C. § 2000d-1.[8] Reasonable regulations properly adopted pursuant to an express delegation of rulemaking authority have the force and effect of law. See, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997); *Chrysler Corp* v. *Brown*, 441 U.S. 281, 301-03 (1979); *Batterton* v. *Francis*, 432 U.S. 416 (1977).

There is no basis for revisiting the long standing and consistent position of the Executive Branch that the disparate impact regulations are appropriate to "effectuate" Title VI. Justice Marshall described the early history of the regulations in *Guardians* as follows:

> Shortly after enactment of Title VI, a Presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use "criteria or methods of administration which have the *effect* of subjecting individuals to discrimination." The

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[7] The reasons the Court should not address the validity of the regulations in the circumstances of this case are more fully described in the brief of amicus NAACP Legal Defense and Education Fund, Inc. at 2-6, 9-13.

[8] Section 602 of Title VI is set out in full in Appendix B to this brief. App. 8a-9a.

> Justice Department, which had helped draft the language of Title VI, participated heavily in preparing the regulations. Seven federal agencies and departments carrying out the mandate of Title VI soon promulgated regulations that applied a disparate-impact or "effects" test.

463 U.S. at 618-19 (dissenting opinion) (citations and footnotes omitted). Since "the initial promulgation of regulations adopting an impact standard, every Cabinet Department and about 40 federal agencies [have] adopted standards interpreting Title VI to bar programs with a discriminatory impact." *Id.* at 619 (Marshall, J., dissenting).

Fundamentally, Title VI is Spending Clause legislation. See *Gebser*, 524 U.S. at 286 (Title VI and Title IX "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds").[9] The benefits and burdens of participation in any federal financial assistance program are entirely voluntary. Reasonable regulations requiring recipients of federal financial assistance to bear the relatively modest burden of avoiding unnecessary policies or practices that have the "effect" of discriminating on the basis of race, color, or national origin in consideration of the benefits of federal financial assistance are appropriate means of "effectuat[ing]" § 601.

Title VI was enacted to assure that federal tax dollars collected from all the people would not be used to subsidize programs from which any person is excluded on the basis of race, color, or national origin. Direct evidence of intentional discrimination is seldom available. In many cases, the line between disparate impact or discriminatory "effects," on the

[9] Section 5 of the Fourteenth Amendment provides additional support for Title VI and Title IX. *See* note 5, *ante*.

one hand, and intentional discrimination, on the other, is likely to be indistinct and not easily discernible. For example, evidence that, without adequate justification, Alabama adopted and maintained a policy knowing that it would disproportionately exclude Hispanics from participation in a particular program and, further, rejected alternative policies that would have accomplished its legitimate objectives without disparate impact on Hispanics, might not compel an inference of intentional discrimination (although such an inference might well be supported by such evidence). See, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) (evidence of discriminatory impact may be probative of discriminatory intent); *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1319 (11th Cir. 1999) (disparate impact is one of the factors a court may consider in identifying discriminatory animus).

Requiring recipients of federal financial assistance to forgo unnecessary practices that have the effect of denying the benefits of federally subsidized programs on the basis of race, color, or national origin thus minimizes the risk that federal dollars will be used to subsidize discriminatory practices contrary to the objectives of Title VI, because of the practical difficulty of establishing intentional discrimination without direct evidence. The disparate impact regulations reasonably require recipients of federal financial assistance to steer clear of anything approaching intentional discrimination, in effect, establishing a margin of safety appropriate to achieve Congress' objective. On its face the burden of the disparate impact regulations is modest, since a recipient would be required to forgo policies or practices that have discriminatory effects only if the policies or practices cannot be justified by reference to legitimate considerations. See, *e.g.*, *Guardians*, 463 U.S. at 623 n.15 (Marshall, J., dissenting) (noting that a defendant would have the opportunity to respond to *prima facie* showing of discriminatory impact by demonstrating that the policy or practice was justified by

nondiscriminatory considerations); see also *New York Urban League*, 71 F.3d at 1038-39 (accepting State's justification for the asserted disparate impact); *Bryan*, 627 F.2d at 616-20 (same). Whatever the burden, however, it is voluntarily assumed and endured. Alabama is always free to avoid the burden by forgoing federal financial assistance.

Moreover, each recipient of federal financial assistance has long been on notice that one of the conditions for federal financial assistance is compliance with applicable disparate impact regulations adopted by the agency or department responsible for administration of the particular federal financial assistance program. If the risk of an unreasonable interpretation of the disparate impact regulations in a particular program is too great, the State need not participate. Alternatively, if a particular interpretation of the disparate impact regulations is wholly unanticipated, the State always retains the option of forgoing future federal financial assistance and completely avoiding any such obligation.

Although this Court has construed the language of § 601 as directly reaching only intentional discrimination, the Court has never found any evidence that Congress intended to approve policies or practices that had the effect of excluding participation in federally financed programs on the basis of race, color, or national origin. Nor is there any evidence that Congress intended to preclude regulations that reached discriminatory effects under particular programs. On the contrary, in *Guardians* five members of the Court concluded that the disparate impact regulations were valid and enforceable in an action for equitable relief. 463 U.S. at 607 n.27 (White, J.) ("The dissenters ... join with me to form a majority for upholding the validity of the regulations incorporating a disparate-impact standard."); see *id.* at 584 n.2 (White, J.), 623 n.15 (Marshall, J., dissenting), 642-45 (Stevens, Brennan, and Blackmun, JJ., dissenting). Shortly after *Guardians* was decided, in an opinion for a unanimous Court, Justice Marshall explained the holding in *Guardians* as

follows: "First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." *Alexander*, 469 U.S. at 293.

At a minimum, Congress' long acquiescence in the disparate impact regulations confirms its view that requiring recipients of federal financial assistance to forgo policies or practices that have the effect of discriminating on the basis of race, color, or national origin as a condition of federal financial assistance is a reasonable means of effectuating the objectives of § 601. In 1966, Congress considered and rejected a proposal intended to invalidate the disparate impact regulations adopted to effectuate Title VI. See *Guardians*, 463 U.S. at 620 & n.8 (Marshall, J., dissenting).

In 1975, drawing on the Title VI regulations, the Department of Health, Education, and Welfare promulgated regulations to implement Title IX, including disparate impact regulations. As this Court has recognized, those regulations went through a "unique" enactment process that provides strong evidence that they – and inferentially the Title VI regulations upon which they were based – accurately reflect congressional intent. *Grove City College* v. *Bell*, 465 U.S. 555, 567 (1984). Specifically, the regulations were "submitted ... to Congress for review," *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 531, pursuant to a statutory procedure that afforded Congress "an opportunity to invalidate aspects of the regulations it deemed inconsistent with Title IX," *Grove City*, 465 U.S. at 568. None of the proposed regulations, which included disparate impact regulations, see 40 Fed. Reg. 24128, 24140, 24141, 24143 (June 4, 1975), was disapproved by Congress. Although this Court has noted that Congress's failure to disapprove the regulations is "not dispositive," *Grove City*, 465 U.S. at 568, it has recognized that "it strongly implies that the regulations accurately reflect

congressional intent." *North Haven*, 456 U.S. at 533-34. Accordingly, the unique postenactment history of Title IX provides strong evidence that Congress regarded disparate impact regulations as consistent with its intent and objectives in adopting the broad anti-discrimination provisions in Title IX and, by implication, Title VI as well.

Finally, during consideration of legislation that became the Civil Rights Restoration Act of 1987, Congress heard testimony that this Court had upheld the validity of the disparate impact regulations in *Guardians*. See H.R. Rep. No. 98-829, pt. 1, at 24 ("[t]he substantive regulations were affirmed as valid in ... *Guardians*"); *id.* at 33-35; 130 Cong. Rec. 27935 (1984) (Sen. Kennedy); *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 98th Cong. 23-24 (1984) (representatives of the U.S. Commission on Civil Rights describing *Guardians* as holding that while § 601 only proscribes intentional discrimination, disparate impact regulations are permissible). Yet, Congress took no action to disapprove the regulations.

Particularly in this "contractual" context, see, *e.g.*, *Gebser*, 524 U.S. at 286, where the Executive Branch, the Legislative Branch, the lower federal courts, and the recipients of federal financial assistance have accepted the validity of the disparate impact regulations for nearly four decades under a host of federal spending programs and contracted on that basis, this Court should not disrupt the settled expectations of the parties.[10] Here, Congress has had ample opportunity to consider and correct any error the agencies or the courts

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[10] *Cf. Square D Company* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)) ("'*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled'" the way a current majority of this Court might have decided the issue in the first instance.)

might have made in this area. There is no reason for the Court to relieve Petitioners of obligations voluntarily assumed in consideration of federal financial assistance – obligations that can be avoided by simply forgoing future federal financial assistance.[11]

II. THE DISPARATE IMPACT REGULATIONS CAN BE ENFORCED IN A PRIVATE RIGHT OF ACTION FOR EQUITABLE RELIEF.

The standard for determining whether federal regulations can be enforced in an implied private right of action should be no more stringent than that used for determining whether such regulations can be enforced in § 1983 actions.[12]

The reason the § 1983 analytic framework should be borrowed in this case is because, as discussed above, Congress has authorized a private right of action to enforce federal rights created under Title VI. Consequently, the question presented is not one of federal court jurisdiction or judicial power as it might be in a case involving the implication of a private right of action in the first instance. For the same reason, the separation of powers issues raised by

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[11] Nothing in this Court's decision in *Central Bank* v. *First Interstate Bank*, 511 U.S. 164 (1994), suggests that the disparate impact regulations are beyond the authority granted in § 602. In *Central Bank* this Court reiterated the view expressed in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), that the SEC's authority to proscribe "manipulative or deceptive device[s] or contrivance[s]," *id.* at 197, does not reach conduct that is neither manipulative nor deceptive. *Central Bank*, 511 U.S. at 173-74. *See generally United States* v. *O'Hagan*, 521 U.S. 642 (1997). In *Central Bank* the Court held that Section 10(b) and the SEC's rule 10b-5 did not reach "aiding and abetting" manipulative or deceptive conduct. 511 U.S. at 175-76. In *Hochfelder*, the Court held that the statute did not reach negligence and the rule could not be read to impose damages for negligence. 425 U.S. at 199.

[12] The § 1983 analytic framework is a useful alternative to the *Cort* v. *Ash* analysis in the circumstances of this case, although we believe the result would be the same if the *Cort* v. *Ash* analysis were applied.

implying a private right of action in the first instance are not implicated in this case. Compare *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990), with *Cannon*, 441 U.S. at 730-31, 742-47 (Powell, J., dissenting). Rather, the controlling issue here is simply whether the disparate impact regulations can be enforced in the private action already determined to have been authorized by Congress. As in the § 1983 context, unless there is some evidence that Congress intended to foreclose private enforcement of the disparate impact regulations, equitable relief to compel compliance with the regulations in an appropriate case is presumptively appropriate.

In determining whether a statute or regulation is a "law" that can be enforced in a § 1983 action, this Court has identified three relevant considerations. See, *e.g.*, *Blessing*, 520 U.S. 329 (1997); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Wright* v. *City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987). The first is whether the language of the statute or regulation creates an enforceable federal right for the benefit of the plaintiff (*i.e.*, a binding obligation that is not too vague and amorphous to be enforced by a federal court).[13] The second and third considerations are whether Congress expressly foreclosed private enforcement, *Wright*, 479 U.S. at 423-24, and whether private enforcement would be inconsistent with an alternative comprehensive enforcement scheme. Compare *Blessing*, 520 U.S. at 346-48, with *Smith* v. *Robinson*, 468 U.S. 992, 1016-21 (1984), and

[13] This factor significantly limits the nature and scope of the regulations that will be enforceable by private parties. *See Suter* v. *Artist M*, 503 U.S. 347, 355-57 (1992); *compare Blessing*, 520 U.S. at 342-46 (O'Connor, J.) (emphasizing the need to focus on the language of the specific provision asserted to create a federal right), *with Wright*, 479 U.S. at 438 (O'Connor, J., dissenting) (suggestion that "*any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or promulgating agency contemplated such a result" would be "troubling").

Middlesex County Sewerage Auth. v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 119-21 (1981).

Using a similar analysis to determine whether the Title VI disparate impact regulations can be enforced in this case is reasonably straightforward. The disparate impact regulations create a federal right. As a condition of federal financial assistance, the regulations require recipients to administer their programs or activities without using unnecessary practices that have the effect of discriminating on the basis of race, color, or national origin. The regulations establish the correlative right of every person in the United States to participate in programs financed with federal financial assistance free from the burden of unnecessary practices that have the effect of discriminating on the basis of race, color, or national origin.

There is no indication that Congress intended to foreclose private enforcement of the disparate impact regulations adopted pursuant to § 602, just as this Court found no indication Congress intended to foreclose a private action to enforce § 601. See *Cannon*, 441 U.S. at 712-14 n.49; *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 420 n.28 (1978) (Stevens, J. dissenting). On the contrary, as the Court explained in *Cannon*, one of the purposes of both Title IX and Title VI was "to provide individual citizens [with] effective protection against" discrimination. 441 U.S. at 704.

Nor will a private action to enforce the disparate impact regulations interfere with the administrative enforcement scheme. See *Blessing*, 520 U.S. at 347-48 ; *Wilder*, 496 U.S. at 520-23; *Wright*, 479 U.S. at 427-29. Contrary to the Brief for Petitioners (17, 27-28), the oversight Congress thought appropriate for agency termination of funding is irrelevant to private actions by individuals seeking only to protect their interest in participating in federally financed programs free from unnecessary practices that effectively discriminate on the basis of race, color, national origin, sex, or other bases proscribed in civil rights statutes. Indeed, the distinction

between private enforcement action and fund termination was specifically noted by Senators Humphrey and Case during consideration of Title VI. *Cannon*, 441 U.S. at 713-14 n.49. As the Court summarized the matter in *Cannon*: "The administrative provisions in §§ 602 and 603 were simply means by which additional – and far more controversial – procedures [*i.e.*, fund termination] were established and then limited." *Id.* at 714 n.49; see also *id.* at 711 n.47; *Bakke*, 438 U.S. at 420 n.28 (Stevens, J., dissenting).

Further, during consideration of the Civil Rights Restoration Act of 1987, Congress was warned that disparate impact regulations might be enforced in private actions, but again Congress took no action to limit the statute or the regulations. For example, the Office of Management and Budget submitted a memorandum stating:

> Currently, the scope of [the DOE disparate impact regulations] ... is limited to a recipient's federally funded programs and activities. The effect of extending them to all of a recipient's activities would be significant. Any assistance to a State or city government would, for example, apply such requirements to all of their licensing and professional certification procedures. As noted, bar exams, medical boards, teacher competency exams, and a host of similar standards alleged by advocacy groups to have "discriminatory effects" would now be covered by the existing regulations for the first time and would be subject to agency enforcement activities *and private lawsuits*.

Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong. 530 (1984) (emphasis in original omitted; emphasis added); see also *id.* at 532 (OMB memorandum warning of the prospects of increased exposure to "'discriminatory effects'" litigation in private enforcement actions); *Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the House Comm. on Educ. & Labor and*

the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 99th Cong. 734, 1095, 1099 (1985); 134 Cong. Rec. 42567 (1988) (Sen. Hatch) ("Of course, advocacy groups will be able to bring private lawsuits making the same allegations [of violations of disparate impact regulations] before federal judges.").[14]

In a private action, the disparate impact regulations provide an appropriate basis for equitable relief, which would not include recovery of damages. See *Gebser*, 524 U.S. at 287-92 (distinguishing between standard for damages relief and standard for prospective relief). The obligation to comply with the requirements of the long-standing disparate impact regulations is unambiguous and well recognized as an important component of the Title VI legal framework; recipients of federal financial assistance accept the money with full notice of the requirements and agree to comply. Recipients of federal financial assistance have been on notice of the prospect of private enforcement at least since this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1973). See

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[14] Several courts of appeals have expressly held that disparate impact regulations promulgated by agencies under Title VI may be enforced in a private right of action. *See Powell* v. *Ridge*, 189 F.3d 387, 400 (3d Cir. 1999); *Burton* v. *City of Belle Glade*, 178 F.3d 1175, 1202 (11th Cir. 1999); *David K.* v. *Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988). Others have assumed the availability of a private right of action to enforce disparate impact regulations under Title VI. *See, e.g., Indianapolis Minority Contractors Ass'n.* v. *Wiley*, 187 F.3d 743 (7th Cir. 1999); *Boulahanis* v. *Board of Regents*, 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 2762 (2000); *Ferguson* v. *City of Charleston*, 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1239 (2000); *Buchanan* v. *City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996); *New York Urban League, Inc.* v. *New York*, 71 F.3d 1031 (2d Cir. 1995); *Quarles* v. *Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750 (5th Cir. 1989); *Larry P.* v. *Riles*, 793 F.2d 969 (9th Cir. 1984); *Castaneda* v. *Pickard*, 781 F.2d 456 (5th Cir. 1986); *United States* v. *LULAC*, 793 F.2d 636 (5th Cir. 1986); *Latinos Unidos de Chelsea en Accion (LUCHA)* v. *Sec'y of Hous. & Urban Dev.*, 799 F.2d 774 (1st Cir. 1986); *Georgia State Conference of Branches of NAACP* v. *Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Bryan* v. *Koch*, 627 F.2d 612 (2d Cir. 1980).

Cannon, 441 U.S. 687 n.8; *Bakke*, 438 U.S. at 419 n.25 (Stevens, J., dissenting).

Whether Alabama anticipated the result in this case or not, plaintiffs seek no more than prospective compliance with the requirements of applicable federal regulations, as construed by the federal district court and the court of appeals. For this reason, Petitioners' reliance on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981) is entirely misplaced. See *Gebser*, 524 U.S. at 287 (O'Connor, J.) (quoting *Franklin*, 503 U.S. at 74) (the central concern in *Pennhurst*, *Franklin*, and *Guardians* was ensuring that the receiving entity has "'notice that it will be liable for a monetary award'"). If Alabama believes the obligation to offer its written driving test in languages other than English is too onerous, it retains the option of forgoing federal financial assistance and avoiding the burden altogether. Alabama cannot, however, take the money and ignore the obligation.

III. FULL PRIVATE ENFORCEMENT OF THE CIVIL RIGHTS LAWS IS ESSENTIAL TO PROVIDE EQUAL OPPORTUNITY.

The question whether disparate impact regulations adopted by federal agencies to effectuate Title VI of the Civil Rights Act of 1964 are privately enforceable is important to those who are discriminated against on the basis of race, color, national origin, sex, age, or disability.

In the case of Title IX, for example, which protects women against discrimination in education, this Court has held that Title IX should be accorded "'a sweep as broad as its language'" in order to give the anti-discrimination provision "'the scope its origins dictate.'" *North Haven*, 456 U.S. at 521. Consistent with the expansive purpose of the statute, the Department of Education's Office for Civil Rights has adopted regulations to effectuate Title IX that prohibit

conduct or policies that have a disparate impact based on sex.[15]

Title IX's disparate impact regulations have been essential to the progress made to date, ending policies and practices that, although not facially gender-biased, had a disproportionately adverse impact on women. For example, Title IX's disparate impact regulations have stamped out discriminatory practices against students who are married or have children – students for whom education is particularly critical to their prospects for economic self-sufficiency. The regulations make clear that Title IX's proscription against discrimination on the basis of sex prohibits discrimination against students on the basis of marital or parental status. 34 C.F.R. §§ 106.21(c), 106.40, 106.57.

Title IX's disparate impact regulations also are an important means of ensuring that standardized tests are designed and used in a manner that is free from gender bias. The Title IX regulations provide that tests used as admissions criteria must validly predict success in the area being tested. See *id.* § 106.21(b)(2) (schools cannot use tests as admissions criteria that have a "disproportionately adverse effect" on women "unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable"). It is well-documented that "[t]here is a substantial record of disparities in scoring between male and female students on many standardized tests dating from

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[15] *See, e.g.*, 34 C.F.R. § 106.21(b)(2) (prohibiting tests or other criteria for admission which have a "disproportionately adverse effect on persons on the basis of sex"); *id.* § 106.52 (prohibiting tests or other criteria for employment which have "a disproportionately adverse effect on persons on the basis of sex"); *id.* § 106.34(d) ("Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.").

before Title IX's enactment and continuing over the last 25 years," including the SAT and PSAT. Nat'l Coalition for Women and Girls in Educ., *Title IX at 25: Report Card on Gender Equity* 35 (June 1997) ("*Report Card*"). Title IX's disparate impact regulations have proven to be an important means of challenging the design and use of such tests. For example, in response to a complaint filed with the Education Department's Office for Civil rights alleging that the PSAT was gender-biased in violation of Title IX, the College Board revised the PSAT to include a test of written English. *Id.* at 37. Similarly, a federal court enjoined the State of New York from relying exclusively on SAT scores to award certain college scholarships because it concluded that such reliance had a discriminatory impact on female students in violation of the Title IX regulations. *Sharif* v. *New York State Educ. Dep't.*, 709 F. Supp. 345 (S.D.N.Y. 1989). As a result, the State began to take grades into consideration as well and "the scholarship awards became more equitably distributed among male and female students." *Report Card* at 38.[16]

Finally, Title IX has had a significant impact in women's higher education. In 1979, women college undergraduates outnumbered men college undergraduates for the first time since World War II. Nat'l Advisory Council on Women's Educ. Programs, *Title IX: The Half Full, Half Empty Glass* 7 (Fall 1981). When Title IX was enacted in 1972, women were awarded 44 percent of all bachelor's degrees, 41 percent

[16] *See also Cureton* v. *NCAA*, 37 F. Supp. 2d 687, 697-714 (E.D. Pa.), *rev'd on jurisdictional grounds*, 198 F.3d 107 (3d Cir. 1999) (district court held (1) that NCAA minimum standardized test scores for eligibility to participate in intercollegiate athletics and to qualify for athletic scholarships had an unjustified disproportionate impact on African American women and men in violation of Title VI regulations; and (2) there were reasonable alternatives to the policy that would have met the NCAA's legitimate objectives with less of a disproportionate impact). The benign description of the eligibility standard offered in the NCAA Amicus Brief (at 4) simply ignores the district court's findings.

of master's degrees, 16 percent of doctoral degrees, and six percent of first professional degrees. *Report Card* at 6. The figures for 1996-97 were 56 percent of bachelor's degrees, 51 percent of master's degrees, 39 percent of doctoral degrees, and 40 percent of first professional degrees. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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December 13, 2000

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APPENDICES

APPENDIX A

STATEMENTS OF INTEREST

The National Women's Law Center

The *National Women's Law Center ("Center")* is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunities in education for girls and women through full enforcement of Title IX of the Education Amendments of 1972. The Center has provided assistance or participated as counsel or *amicus curiae* in a range of cases to secure the equal treatment of women under the law, including successfully arguing before the Supreme Court that Title IX requires schools to address student-to-student sexual harassment in *Davis v. Monroe County Board of Education*.

The American Association of University Women

For well over a century, *American Association of University Women (AAUW)*, an organization of 150,000 members, has been a catalyst for the advancement of women and their transformation of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal change. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues, including: gender equity in education; reproductive choice; social security; and workplace and civil rights issues. AAUW supports constitutional protection and enforcement of civil rights for all individuals, and opposes all forms of discrimination.

The American Jewish Committee

The *American Jewish Committee ("AJC")*, a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that the only way to achieve this goal is to safeguard the civil and religious rights of all Americans, and has long been a staunch opponent of discrimination, whether based on religion, race, gender, or national origin. We join in this case because we take the position that English-only policies, which are a direct outgrowth of the anti-immigrant movement, unfairly penalize new immigrants, are inherently divisive, and serve no positive function in that they have not been shown to increase English literacy.

The Anti-Defamation League

The *Anti-Defamation League (ADL)* was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has long been vitally interested in protecting the civil rights of all Americans, believing that every American has a constitutional right to be treated as an individual, equal under the law, rather than as a part of a racial, ethnic, religious, or gender-defined group. Pursuant to this mandate, ADL has previously filed *amicus* briefs in numerous discrimination cases before this Court, including such landmarks as *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The Connecticut Women's Education and Legal Fund, Inc.

The *Connecticut Women's Education and Legal Fund, Inc.* (CWEALF) is a nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional

lives. CWEALF was founded in 1973 and has a membership of over 1,000 individuals and organizations.

The Council of the Great City Schools

The *Council of the Great City Schools* was organized in 1961 and is the only organization in the nation exclusively representing the needs of urban public schools. It is composed of 55 large city school districts that serve over 6.0 million school children. Over 80% of Council member students are African-American, Hispanic, or Asian American. Council member students come to school speaking 120 different languages. All Council members are themselves federal fund recipients, with federal funding representing just under 11% of their total revenues. One of the Council's central missions is to advocate for inner-city students so that they may share on a fair and equitable basis in the education opportunities that are so vital to success in our society.

Girls Incorporated

Girls Incorporated is a national organization that provides direct services to school age girls through its affiliates and nationally addresses gender-specific and youth issues. We have published our Advocacy Statements that delineate our position on such matters as equitable allocation of resources and girls' rights.

The National Organization for Women (NOW) Foundation

The *National Organization for Women (NOW) Foundation* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a contributing membership of over 500,000 women and men and more than 500 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure full equality for all women, including the elimination of discrimination on the basis of

race or national origin. In furtherance of that goal, NOW Foundation has supported related litigation and legislation, and has an ongoing interest in the availability of private rights of action to enforce civil rights laws and the regulations implementing them.

The National Partnership for Women & Families

The *National Partnership for Women & Families* is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has grown from a small group of volunteers into one of the nation's most powerful and effective advocates for women and families. Working with business, government, unions, nonprofit organizations, and the media, the National Partnership is a voice for fairness, a source for solutions, and a force for change. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the federal circuit courts of appeal to advance women's opportunities in education.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity. For years, NOW LDEF has fought for educational equity for girls and the full enforcement of Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sex discrimination in education programs

under Title IX and joins this case because of its importance to ensuring equal opportunity in all educational programs.

Title IX Advocacy Project

The *Title IX Advocacy Project ("the Project")* is a youth empowerment and educational/legal advocacy organization that was founded in September 1994 to work with young people and their adult allies to promote gender equity in low-income middle schools and high schools in greater Boston. Currently, the Project focuses on eliminating 1) sexual harassment in school, 2) discrimination against pregnant and parenting students, and 3) gender inequity in school-based athletics programs, all of which violate Title IX, the federal law that prohibits gender discrimination in schools receiving federal funds.

Trial Lawyers for Public Justice, P.C.

Trial Lawyers for Public Justice, P.C. ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to using trial lawyers' skills and strategies to advance the public good. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. TLPJ has litigated numerous discrimination cases under federal civil rights laws, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and federal agency regulations implementing these statutes. These cases demonstrate TLPJ's longstanding commitment to advancing equal opportunity in federally funded programs and activities. To ensure that such programs and activities conduct themselves in a non-discriminatory manner, TLPJ believes it is critical that they continue to be subject to private lawsuits

for engaging in conduct that has an unjustified disparate impact on minorities, women and/or other protected classes.

Women Employed

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed believes that women are entitled to the same rights and opportunities as men, whether their interests lie in sports, arts, or business.

The Women's Law Project

The *Women's Law Project (WLP)* is a nonprofit public interest law firm located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.

The Women's Sports Foundation

The *Women's Sports Foundation* is a 501(c)(3) nonprofit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and creating an educated public that supports gender equity in sports. The Foundation distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquires a year concerning Title IX and other women's sports related questions, and

administers award programs to increase public awareness about the achievements of women in sports.

APPENDIX B

Section 602 of the Civil Rights Act of 1964 is follows:

> Each Federal department and agency which is empowered to extend federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and

> Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1.

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No. 99-1908

IN THE
Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL HEALTH LAW PROGRAM, CENTER FOR CONSTITUTIONAL RIGHTS, CENTER FOR LAW IN THE PUBLIC INTEREST AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST*

As described in the Appendix to this Brief, *Amici Curiae* are nonprofit law firms, committed to securing the rights to equal treatment and full participation of those subjected to race- and national-origin-based discrimination. *Amici* have represented clients in both administrative and judicial Title VI proceedings, and have a realistic, first-hand understanding of the constructive and important – though limited – role played by private enforcement of regulations such as those involved here.

Various of *Amici* participated, as counsel of record or *Amicus Curiae*, in the earlier cases of this Court that helped give definitive shape to the present Title VI enforcement regime (and those for related civil rights protections), *Alexander* v. *Choate*, 469 U.S. 287 (1985); *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Guardians Ass'n.* v. *New York City Civil Serv. Comm'n*, 463 U.S. 582 (1983); *University of Cal. Regents* v. *Bakke*, 438 U.S. 265 (1978) – as well as in important cases concerning the power and responsibility of the Executive Branch to act against discrimination. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983); *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*), *later proceeding dismissed sub nom. W.E.A.L.* v. *Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). And, on numerous occasions, representatives of *Amici* organizations have been called upon to testify before Congress concerning how best to strengthen Title VI and other civil rights protections.

Amici are committed to preserving the integrity and stability of our Nation's civil rights laws and are concerned by the efforts of Petitioners and their supporting *Amici Curiae* in this case to draw into question – and ultimately unsettle – legal rules that have become a key component of that body of law.

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*Consent to file this Brief has been sought and obtained from both parties. Pursuant to this Court's Rule 37.6, *Amici* attest that no counsel for a party had any role in authoring this Brief and no outside party has made a monetary contribution for its preparation or submission.

PRELIMINARY STATEMENT

The Court has granted a petition for certiorari raising this lone question:

> Whether Congress intended to create a private cause of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress

For the reasons set forth more fully in the Brief of Respondent Martha Sandoval, *et al.*, we believe that question (even as tendentiously formulated) must be answered affirmatively. As the text and structure of the statute make clear, Congress intended Title VI to operate as a coherent whole – with Section 601 stating a basic principle and Section 602 directing those agencies administering federal spending programs to promulgate rules and regulations aimed at carrying forward the anti-discrimination principle in distinct factual settings. See *Alexander* v. *Choate*, 469 U.S. 287, 293-94 (1985). The inescapable import of this Court's decisions is that Congress intended for private enforcement of Title VI rights, see *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 71-72 (1992), and for decades, this Court, Congress, administrative agencies, and federal fund recipients themselves have understood that those subjected to discriminatory practices could file suit, irrespective of whether the rule of decision is supplied by Section 601, by the regulations promulgated to effectuate that provision, or by both. See *Guardians Ass'n.* v. *New York City Civil Serv. Comm'n*, 463 U.S. 582 (1983).

Petitioners have stated no compelling justification for disturbing the settled understanding – one accepted by every federal Circuit to have considered the matter and endorsed by the

Executive Branch – whereby the nature of the alleged violation (purposeful discrimination or its unintended "functional[] equivalent," *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988)), determines the scope of the available remedy, but not the existence of an individual right. See *Guardians*, 463 U.S. at 598 (White, J., announcing judgment of Court) (violations of effects regulations warrant prospective relief only); *Gebser* v. *Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998).

As *Gebser* explained, the appropriateness of the pragmatic approach taken in Justice White's *Guardians* opinion is rooted in the need to reconcile: (1) the conclusion that Congress intended private suits and (2) the fact that Congress did not legislate a detailed roadmap for such enforcement, see 524 U.S. at 284. The framework of the *Guardians* opinion, we respectfully submit, is both more "sensible," *id.*, and more faithful to the statute that Congress enacted than is the substitute that Petitioners would have the Court, at this late date, impose.

SUMMARY OF ARGUMENT

Now that certiorari has been granted on the question of private enforcement, Petitioners (somewhat circumspectly) and their supporting *Amici* (far less abashedly), see Briefs *Amici Curiae* of the Washington Legal Foundation, *et al.* (WLF) and the Pacific Legal Foundation (PLF), *et al.* (collectively, "Legal Foundations"), are pressing the Court to effect an even more drastic break with settled law. They propose that this case be used to reconsider decisions affirming the legality of agency regulations proscribing fund recipient practices that operate, unjustifiably, to discriminate against members of racial and ethnic minority groups. See *Choate*, 469 U.S. at 293-94 ("[a]ctions having an unjustifiable disparate impact on minorities [may] be redressed through agency regulations designed to implement the purposes of Title VI"); *Guardians*, 463 U.S. at 584 & n.2 (White, J., announcing judgment of the Court); *Lau*

v. *Nichols*, 414 U.S. 563, 570 (1974) (Stewart, J., concurring).

For the reasons set forth below, this case is no occasion for the Court to reconsider, let alone repudiate, what has become the settled understanding of Title VI. At the outset, Petitioners stand in an unusually weak position from which to argue that the validity of the regulations should (let alone, must) be addressed. Not only did Petitioners accept federal grants on the express understanding that they would be bound by the regulations, but they did not seek to raise the issue of validity in the courts below – or even in their petition for certiorari to this Court. Indeed, as recently as in the petition for certiorari, Petitioners gave every indication that they accepted that the validity question had long been resolved, in favor of the regulations. Although the power of this Court is not confined to addressing questions properly preserved and fairly presented in certiorari petitions, departures from those prudential limitations remain the rare exception. Indeed, if the validity issue is as important and ubiquitous as the Petitioners and their supporters would have the Court believe, there is that much less reason for the Court to stretch the Rules in order to resolve it here.

There is a second, more fundamental basis for resisting Petitioners' invitation: the consistency between regulation and statute has already been considered and decided – correctly – by this Court. As is explained below, the Legal Foundations' efforts to re-cast as "dictum" what this Court (and many others) has described as "holding," see *Choate*, 469 U.S. at 293, fall short by their own terms. The affirmative rulings on validity were an integral part of the Court's reasoning in *Choate*, *Guardians*, and *Lau*, and an approach that casts aside as "dictum" any legal conclusion arrived at in a case that could have been decided on more narrow grounds unduly slights the strong interest in the stability and orderly development of the law.

But even to engage in the doubtful parsing of concurring

opinions that the Legal Foundations urge risks obscuring a more basic fact: the validity of these regulations (and countless others modeled on them) has been a first principle of federal civil rights law for a generation. Billions, if not trillions, of dollars have been appropriated on the understanding that recipients would operate in conformity with their mandate (with recipient entities, like Petitioner, willingly agreeing to abide by them). Proposals to curb these regulations have never succeeded in Congress, see, *e.g.*, 112 Cong. Rec. 18715 (1966) (rejecting proposal to amend Title VI so as to require proof of "intent to exclude"), and on more than one occasion, Congress (in whose name, presumably, the regulations would be struck down) has revised – and expanded – Title VI with full awareness of what they require.

Congress has also, over time, passed major civil rights laws explicitly modeled on Title VI – both the Section 601 prohibition and the Section 602 effectuating regulations, see, *e.g.*, 20 U.S.C. §§ 1681, 1682. In fact, dozens of federal statutes have expressly directed agencies to promulgate regulations "similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964," see, *e.g.*, 15 U.S.C. § 775.

Finally, not only is it impossible for Petitioners and their *Amici* to articulate the sort of "special justification," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), ordinarily required for unsettling so long- and widely-accepted a statutory and regulatory regime, they do not even clear the very first hurdle – showing that the Court's decisions affirming the validity of the regulations were in error. On the contrary, the argument against the regulations' validity reduces to a single, flawed premise: that because the prohibition of Section 601, by its own force, reaches only purposefully discriminatory practices, see *University of Cal. Regents* v. *Bakke*, 438 U.S. 265, 287 (1978) (Opinion of Powell, J.) (1978); *id.* at 328 (Brennan, J., concurring in part and dissenting in part), it necessarily follows that Congress intended

to withhold from the Section 602 delegation of "effectuating" authority the power to promulgate discriminatory results regulations.

But that is not the best – let alone the only – interpretation of those statutory provisions. The Legal Foundations do not point to affirmative evidence from the text or legislative history that Congress specifically decided that "effectuating" regulations could not incorporate a results standard, see *Chevron USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Both the text and the legislative history fully support the contrary construction of the statute endorsed, unanimously, in *Choate*: *i.e.*, that the Section 602 delegation comprehends, among other things, the power to determine, in the first instance, "what sorts of disparate impacts upon minorities constitute[] sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." 469 U.S. at 294. Under any circumstances, the hypothesized antipathy to disparate impact standards seems implausible from a Congress concerned that "public funds * * * not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination," 110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963). And the fact that the same Executive Branch agencies which helped draft the language of Title VI were involved in promulgating the 1964 regulations containing "effects" language substantially indistinguishable from what is questioned here profoundly undermines, if it does not foreclose, arguments that the regulations contravened specific congressional intent.

In fact, the primary authority cited for the proposition that Section 601 does not by its own force proscribe disparate impacts is *Bakke*, where five Justices arguably embraced that construction. But four of those five Justices expressed that view

in an opinion that expressly and repeatedly endorsed the validity of agency regulations requiring more of recipients than does the Constitution. 438 U.S. at 344 (Brennan, J., concurring in part); see also *id.* at 284 (Powell, J.) (noting that term "discrimination" is not unambiguous).

To the extent that Petitioners and *Amici* insist that regulations, generally, may not reach conduct that "goes beyond" what the provision being "effectuated" would, of its own force, proscribe, they are not correct. See, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997). To the extent that they would argue that impact regulations are, as a matter of law, an unreasonable means of "effectuating" a provision prohibiting intentional discrimination, they cannot meet the heavy burden the law imposes. See, *e.g. Commodities Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986) (court must defer "when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes'" of a statute) (quoting 7 U.S.C. § 12a(5)). Although this Court's cases are clear that the impact and intent standards are not one and the same, its decisions have just as frequently acknowledged the substantial convergence between the two theories, and even where effects regulations reach practices that would survive scrutiny under a different test, they plainly can – and do – "effectuate" a prohibition on purposeful discrimination.

By conditioning the receipt of federal funds on a pledge to refrain from unjustifiable impacts, the regulations assure: (1) that tax dollars do not support well-concealed intentional discrimination; (2) that federal dollars do not reinforce harms caused by intentional discrimination (either by the recipient or other actors); (3) that those who might otherwise engage in intentional discrimination on race and/or national origin are deterred; and (4) they help avoid polarizing accusations of invidious motives, see *Gebser*; cf. *Rust* v. *Sullivan*, 500 U.S. 173,

188 (1991) (restrictive rules are reasonable means of preventing "the public * * * impression that Federal funds are being improperly used").

Even if the sundry forecasts of "undesirable" consequences, WLF Br. at 22, had more substance, however, several broad considerations would still strongly support validity. The regulations deal with a subject matter, racial and ethnic discrimination, where the federal government's powers are at their zenith, and where the special leadership role of the Executive Branch repeatedly has been recognized, see *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Moreover, while they have the force and effect of law, the regulations are binding only on those entities, like Petitioners here, that decide the "burden" imposed is one worth bearing.

Finally, this Brief almost surely understates the myriad ways in which the passage of time and intervening events (including this Court's endorsements, whether in "holding" or "dictum") must inform any appraisal of reasonableness. See *FDA v. Brown & Williamson Tobacco Co.*, 120 S. Ct. 1291, 1306 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989).

ARGUMENT

I. The Validity Of The Regulations Is Not Properly Presented In This Case

Notwithstanding the mild protestations of the Petitioners and the vigorous exertions of their *Amici*, the question of the validity of the disparate impact regulations has not properly been presented in this case. It was not raised by Petitioners in the courts below, nor was it presented in their petition for certiorari. Under this Court's Rules and precedents, neglect to preserve a

legal issue ordinarily will preclude its consideration, see, *e.g.*, *Air Courier Conf.* v. *Postal Workers*, 498 U.S. 517, 522 (1991), and there is no cause to depart from the settled rule here.

At the outset, the single question presented in the petition for certiorari – as formulated by Petitioners – gives absolutely no indication of any quarrel with the regulations' validity. To the contrary, the question refers, in strictly neutral terms, to "regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964," indicating disagreement only with the Eleventh Circuit's conclusion as to the means by which those regulations may be enforced, see petition at i (questioning whether the Appeals Court was correct to allow Respondents to "bypass the federal agency review process" where noncompliance is alleged).

This reading of the question presented receives strong confirmation from the section of the petition titled "Reasons for Granting the Writ," which describes the case as presenting "an important question of federal law that this Court has not yet resolved," *id.* at 5, namely "whether Congress intended to create a right of action * * * that would permit private citizens to enforce the terms of Title VI regulations that are incorporated in federal grants."[1] In fact, the only sustained discussion of the validity of the regulations can be found on page 15, which says:

> In *Guardians*, the Court affirmed the denial of compensatory relief to plaintiffs in a Title VI lawsuit, reaching two conclusions as it did so. First, seven members of the Court agreed that proof of discriminatory intent was required to establish a violation of Title VI.

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[1] See also *id.* at 7-8 (noting that the "only issue" in the *Seif* [v. *Chester Residents Concerned for Quality Living*, 524 U.S. 915, *dismissed as moot*, 524 U.S. 974 (1998)] case was whether plaintiffs had a "right to sue").

> Second, five members joined "to form a majority for upholding the validity of the regulations incorporating a disparate-impact standard." In *Alexander* [v. *Choate*], this Court confirmed this reading of *Guardians*.

Id. at 15 (citations omitted). Indeed, Petitioners underscored the word "validity."

The understanding that certiorari was being sought only with respect to the private enforceability of the regulations, and not their validity, draws further support from the Eleventh Circuit's decision, appended to the Petition, which discusses the agency's authority to promulgate the regulations in a single sentence, presenting it as settled law, see Pet. App. 35a.-36a, and notes that Petitioners "concede that [they are] subject to such regulations" by virtue of receiving federal funds. *Id.* Compare WLF Br. at 11-12 (arguing that the appellate court "understood" Petitioners to be challenging the validity of the regulations).[2] And while their *Amici* have spun out a scenario whereby a single, opaque sentence in Petitioners' Eleventh Circuit brief should be construed as raising the validity issue, that creative interpretation must be weighed against the forthright statement, in that same brief, that "the Court [in *Guardians*] upheld the validity of the regulations." Brief of Appellants, at 27-28.

Finally, if the Eleventh Circuit were wrong – as the Washington Legal Foundation now seems certain it was – to have

[2]As support for their argument that the court "fully considered and rejected arguments" about the regulations' validity, see WLF Br. at 12, *Amici* point to a footnote in the Eleventh Circuit's opinion rejecting Petitioners' argument "that the Supreme Court in *United States v. Fordice* overruled *Guardians* and *Lau*." See Pet. App. 47a n.24. This statement, however, is found in the court's discussion of the private enforcement issue, not validity, and Petitioners' brief before the Eleventh Circuit similarly raised the implications of *Fordice* for *Guardians* and *Lau* only in that connection. See Brief of Appellants at 29.

treated the issue of validity as conceded by Petitioners – Petitioners might have been expected to have included in their Petition for Rehearing and Suggestion of Rehearing *En Banc* some protest that they had not conceded what the appellate decision had understood them not to challenge. No such objection appears therein.

While Petitioners' *Amici* correctly note that this combination of "assertions, concessions, and acquiescence" *Steagald* v. *United States*, 451 U.S. 204, 211 (1981), does not deprive the Court of the power to decide questions beyond the scope of those raised in accordance with the Rules (or divest it of the duty to do so where jurisdiction is involved), the validity issue is not jurisdictional, and this is surely not an instance where the Court might opt to resolve a less broadly significant, nonconstitutional issue, so as to avoid ruling on a constitutional question presented by the parties, see, *e.g.*, *Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960).

Thus, while *Amici* insist that "'intelligent resolution'" of the private enforcement question requires consideration of the validity issue, on the ground that no right could exist to enforce an invalid regulation, see WLF Br. at 11 (quoting *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n.5 (1980)), it is not unusual for the Court to assume, for purposes of resolving other questions, that particular regulations are valid, see *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 563 n.10 (1999) (assuming validity of ADA regulations); *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (assuming, without deciding, the existence of a private cause of action under a statute, because the question was not within those on which certiorari was granted). And the Court's cases clearly teach that the fact that an issue is "logically anterior" to a properly presented question does not in itself establish that it must be considered. *Lebron* v. *National R.R. Passenger Corp.* 513 U.S. 374, 406 (1995) (O'Connor, J., dissenting) (collecting cases).

Although the rules against considering issues not raised are prudential, rather than iron-clad, the reasons for applying them are, as the Court has explained, compelling: "[A]llowing the able counsel who argue before us to alter * * * questions or to devise additional questions at the last minute would thwart" the "integrity of the process of certiorari" *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992). Not only is "the practice of smuggling additional questions into a case after we grant certiorari," *Irvine* v. *California*, 347 U.S. 128, 129-30 (1954) (Jackson, J., concurring), unfair to the opposing party – who must choose between (a) maintaining silence on the issue, as a matter of principle, but thereby risking an adverse resolution, and (b) briefing it and being told that he thereby forfeited the right to complain – but doing so risks unfairness to those petitioners who, following the Court's Rules, forthrightly present the questions they want the Court to decide. See generally *Lebron*, 513 U.S. at 406 (O'Connor, J, dissenting).

As *Amici*'s drumbeat warnings of impending litigation only serve to underscore, declining to decide the validity issue in this case would not impair the Court's ability to address the issue on some other occasion (if, indeed, further ventilation of the matter is necessary), and there is nothing remotely unfair about holding this litigant to the Court's well-established rules. There is no claim here of a late-breaking legal or factual development that could explain why issues that Petitioners would now have the Court decide could not have been raised at earlier stages of this case. Very much to the contrary, Petitioners knew about the regulations even before any litigation commenced: indeed, the Department of Public Safety signed a contract expressly agreeing to be bound by those regulations, see Pet. Br. at 11, and its own pre-implementation internal memoranda raised concern that the practice of linking driving privileges to English language proficiency would run afoul of those regulations.

II. The Validity Of The Regulations Has Been Settled

In asking the Court to invalidate the Title VI regulations, Petitioners' *Amici* are not merely pressing an issue that was not carefully preserved in this case. They are asking the Court to disturb an understanding of the law that has been settled since the enactment of Title VI more than three decades ago. The very first regulations promulgated under Title VI – drafted by the same executive branch officials who had played a key role in drafting the statute, see Comment, 36 GEO. WASH. L. REV. 824, 845-46 (1968) – contained "effects" language that is, in relevant respects, indistinguishable from the regulations implicated in this case, see 29 Fed. Reg. 16274-16305 (1964),[3] and in three decisions, this Court specifically considered and affirmed the validity of the Title VI regulations. See *Choate*, 469 U.S. at 293; *Guardians*, 463 U.S. at 584 n.2; *Lau*, 414 U.S. at 569.

Those decisions have been read, correctly, by the Courts of Appeals, as having resolved the validity of the regulations, see, *e.g.*, *City of Chicago* v. *Lindley*, 66 F.3d 819, 828 (7th Cir. 1995); *Ferguson* v. *City of Charleston*, 186 F.3d 469, 479 n.10 (4th Cir. 1999), *cert. granted on other grounds*, 120 S. Ct.1239 (2000), and their precepts – well known to Congress, H.R. Rep. No. 829, Pt. 1, 98th Cong., 2d Sess. 24, 33-35 (1984), the Executive branch, and recipients of federal funds themselves – have influenced the enactment and interpretation of numerous other statutes and shaped civil rights protections for a generation.

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[3]The only difference between the regulation at issue here, 28 C.F.R. § 42.104(b)(2) (2000), and one promulgated in 1964, see 45 C.F.R. § 80.3(b)(3) (1964) (HEW), is that the Justice Department regulation forbids "utiliz[ation of] criteria or other methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin") (emphasis added), while the earlier one reads "as respect [such] individuals").

Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts"). Not only has Congress amended Title VI seven times since its inception without ever indicating disapproval,[4] but it has expressly modeled major pieces of civil rights legislation on the Title VI framework, see 20 U.S.C. § 1681 *et seq.* (Title IX); 29 U.S.C. § 794 (Rehabilitation Act). No less important are the numerous statutes specifically directing the Executive branch to promulgate regulations, aimed at deterring and remedying gender discrimination for example, that track those whose validity the Legal Foundations would have this Court invalidate, as inconsistent with congressional intent. See, *e.g.*, 15 U.S.C. § 775 ("This provision will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964"); 23 U.S.C. § 324 (same); 43 U.S.C. § 1863 (same); 49 U.S.C. § 47123.

In their Briefs *Amici Curiae*, the Legal Foundations ask the Court to treat as legally immaterial this decades-long record of judicial approval and legislative endorsement – and treat the validity question as an "open" one. That approach to statutory construction is in tension with the recent teaching of this Court, see, *e.g.*, *Brown & Williamson*, 120 S. Ct. at 1306 (looking to "legislation that Congress has enacted over the past 35 years"). Indeed, even were it appropriate to engage in the hair-splitting re-reading of prior opinions that *Amici* insist is demanded here, their arguments would fail.

The first burden of the Legal Foundations' argument is to demonstrate the supposed insignificance of the Court's

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[4]See 80 Stat. 1209; 81 Stat. 787; 84 Stat. 121; 93 Stat. 677, 692; 100 Stat. 1845; 102 Stat. 31; 108 Stat. 4026.

unanimous opinion in *Choate*, which offered a description of – and a rationale for – what it identified as the holding of the Court in *Guardians*. The earlier decision, *Choate* explained,

> held * * * that Title VI itself directly reached only instances of intentional discrimination [but also held] that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI [and that] * * * Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

469 U.S. at 293-94. According to the Legal Foundations, this explicit affirmation of the validity of the regulations is inconsequential here, on the grounds: (1) that it represents "dictum" – because the *Choate* case arose under the Rehabilitation Act, rather than Title VI – (2) that it is inaccurate in characterizing the precedential force of *Guardians*; and (3) that it was overruled *sub silentio* in a footnote in the Court's subsequent opinion in *United States* v. *Fordice*, 505 U.S. 717, 732 n.7 (1992).

To begin with, the pertinent part of the *Choate* opinion is not readily described as "dictum." Although *Amici* blithely suggest that *Choate* "had nothing to do with Title VI," WLF at 16; see PLF Br. at 9, the Court's exegesis of Title VI came in the course of considering the primary argument raised by the petitioner in that case: *i.e.*, that because Congress had modeled the Rehabilitation Act on Title VI (and because Title VI had been interpreted, it argued, as foreclosing regulation of all but purposeful discrimination), a regulation that reached beyond "purposeful discrimination against the handicapped" could not be

sustained. See Brief for Petitioner, No. 83-727, at 12.

The *Choate* Court explained that the petitioner's argument rested on an incorrect premise: to the (limited) extent that Title VI and the Rehabilitation Act should be read *in pari materia*, see *id.* at 293 n.7, the Court reasoned, that parallel was not helpful to the State's case. To the contrary, *Choate* continued, "Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination." *Id.* at 295 n.11.

Although the Court went on in that case to endorse the petitioner's narrower arguments, *i.e.*, that the particular disparate impact regulations under which plaintiffs had sued did not entitle them to relief, that fact does not make the Court's resolution of the broader issues less authoritative. When an opinion issues for the Court, "the principle of stare decisis directs [that courts] adhere not only to the holdings of * * * prior cases, but also to their explications of the governing rules of law." *Allegheny County* v. *ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part); see also *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996) ("We adhere in this case, however, not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions").

The Legal Foundations' insistence that the Court substitute their proffered understanding of the *Guardians* decision for the description subscribed to by the unanimous Court in *Choate* – *i.e.*, casting Justice White's opinion as "*dictum*" – is no more persuasive. The meaning of *Guardians* was extensively and adversarially briefed in *Choate*, see, *e.g.*, Brief for Respondents, No. 83-727 at 5, 7, 12, 16, 32, 47. And the *Choate* decision, handed down two Terms after *Guardians*, was frank in summarizing the points of division among the

opinions in the earlier case.

In fact, *Choate*'s explanation of *Guardians* is consistent with the rule that when no single opinion commands the adherence of a majority of the Court, the holding of a case will be deemed to be "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (citation omitted). There can be no disputing that Justice White, who concluded both that there was a private right of action under Title VI, 463 U.S. at 595, and that the valid regulations entitled plaintiffs to relief – but who ultimately voted to affirm on the ground that the regulations entitled plaintiffs to no more relief than they had been granted on their Title VII claim, *id.* at 604-07 – authored the opinion that concurred in the judgment on the narrowest ground. Indeed, Justice White would never have reached the question of appropriate relief had he not concluded, along with four other Justices, that the plaintiffs had a valid entitlement to seek some relief under the impact regulations.[5]

The Legal Foundations' efforts, see, *e.g.*, PLF Br. at 7, to tar Justice White's careful examination of the Title VI questions presented in *Guardians* with the same brush that this Court recently used, see *United States* v. *Morrison*, 120 S. Ct. 1740, 1757 (2000), in disapproving of *dicta* in *United States* v. *Guest*, 383 U.S. 745 (1966), which had purported to overrule *The Civil Rights Cases*, 109 U.S. 3 (1883) – are to say the least,

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[5] *Amici*'s aversion to adding together votes from concurring and dissenting opinions does not appear to be too thoroughgoing: see WLF Br. at 14 (asserting that "[s]even Justices agreed that no Title VI cause of action could be established in the absence of evidence of intentional discrimination"); *id.* at 13 (relying on separate opinions of Justices Powell and Brennan in *Bakke*; PLF Br. at 7, 10 (same).

strained.[6] Not only did Justice White's opinion announcing the judgment of the Court address a (non-constitutional) question that was squarely presented in *Guardians*, it (unlike the *Guest* concurrence) did so in a manner that sought to preserve, and not overrule, prior precedent.[7]

Finally, the Court of Appeals plainly was right – and Petitioners' *Amici*, wrong – concerning the significance *vel non* of the *Fordice* footnote. *See* PLF Br. at 11 (asserting that Court of Appeals ignored the "rule articulated by * * * *Fordice*"). As

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[6]As *Morrison* explained, the "naked dicta," 120 S. Ct. at 1757, of the *Guest* concurrence was "'extraordinary,'" (quoting 383 U.S. at 762)(Harlan, J., concurring in part) – because the concurring Justices had expressly acknowledged that the question they purported to address, that of Congress's power to reach purely private conduct under § 5 of the Fourteenth Amendment, was not, in fact, present in the case before them. *Morrison* explained that to give precedential weight to such dictum – and treat it as overruling century-old authority – is "not the way that reasoned constitutional adjudication proceeds." 120 S. Ct. at 1757.

[7]Although seven Justices in *Guardians* had concluded that one holding of *Lau v. Nichols* could not be reconciled with the various *Bakke* opinions – *Lau*'s conclusion that a Section 601 violation could be established without proof of invidious purpose – Justice White explained that nothing in *Bakke* supplied a basis for impugning the alternative holding of *Lau* – that the Title VI discriminatory effects regulations were valid, irrespective of whether Section 601 would, of its own force, reach unintentional discrimination. 463 U.S. at 591.

As Justice White also noted, 463 U.S. at 590, the language in Justice Brennan's *Bakke* opinion – which he had joined – was itself broader than had been necessary to decide that case. The statutory question presented in *Bakke*, *i.e.*, whether Congress intended Title VI to prohibit the sort of racial classifications that would be permissible under the Equal Protection Clause, surely did not require the Court to decide when and whether Title VI reaches practices that do not classify, but operate, unintentionally, to the unnecessary and disproportionate disadvantage of racial minority groups.

even the Legal Foundations recognize, that case arose in a setting – desegregation of public education – where the Fourteenth Amendment has been construed to apply a unique set of affirmative duties. See *Fordice*, 505 U.S. at 731-32 (distinguishing *Bazemore* v. *Friday*, 478 U.S. 385 (1986) (*per curiam*)); WLF Br. at 20 (arguing that *Fordice* "can properly be characterized as a disparate impact case"). Thus, the Court's conclusion that the generic "affirmative action" desegregation regulation, 34 C.F.R. §100.3(b)(6)(i), should be interpreted as coextensive with the Constitution – which was the position advanced by the responsible administrative agency, see Brief of United States No. 90-1205 at 42 – is not remotely equivalent to a holding that an agency could not promulgate a regulation imposing a duty beyond what the Constitution (or Section 601) has been construed to require. See also *Bazemore*, 478 U.S. at 408-09 (White, J., concurring) ("Petitioners rely on the Department of Agriculture regulation requiring * * * 'affirmative action' to overcome the effects of prior discrimination in its programs. But * * * it is the position of * * * the federal parties that there has been full compliance with the regulation. In view of the deference due the Department's interpretation of its own regulation, we cannot accept petitioner's submission that the regulation has been violated").

III. Settled Statutory Construction Principles Conclusively Establish The Regulations' Validity

But even if the question of the regulations' validity were properly presented in this case, and even if the issue could, in any sense, be treated as a matter of first impression, straightforward application of basic administrative law principles would defeat the Legal Foundations' arguments. Federal courts are obliged to give effect to those agency regulations which: (1) do not contravene congressional resolution of a specific issue and (2) are reasonable. See *Chevron* 467 U.S. at 842-43 (1984). The regulations at issue here satisfy both requirements. See generally

Schor, 478 U.S. at 845 (deference is required "when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing") (quoting 7 U.S.C. § 12a(5)).

A. Congress Contemplated Agency Regulations Prohibiting Unjustifiable Discriminatory Effects

Although presented in a variety of guises, the arguments against the regulations' validity largely boil down to an assertion that the decisions in *Bakke* and *Guardians* -- to the extent they construed Section 601's prohibition of "discrimination" as entirely coextensive with that of the Equal Protection Clause – necessarily foreclose promulgation of agency regulations that forbid recipients from engaging in practices that have unintentional, unjustifiable discriminatory results. See WLF Br. at 19 (quoting *Guardians*, 463 U.S. at 613-15 (O'Connor, J., concurring in judgment)). According to Petitioners and *Amici*, because Congress "intended Title VI not apply in any instance in which there is no evidence of intentional discrimination" or because the 88th Congress "made permissible by statute" or "authorize[d]" "State action that disproportionately affects an identifiable group on the basis of national origin," it is inconceivable that it would simultaneously "permit an executive-branch agency to ban such conduct," Pet. Br. at 26 (emphasis in original).

In so arguing, however, Petitioners and the Legal Foundations simply assume what the law requires them to prove: that Congress affirmatively and specifically decided to exclude promulgation of discriminatory effects regulations from the "effectuating" measures that agencies were authorized – and directed – to promulgate. See *Chevron*. Nothing in the statutory text compels that reading of Sections 601 and 602, and other

statutory construction tools conclusively establish the opposite.

Even when Section 601 is understood as proscribing discriminatory intent only, see *Guardians*, 463 U.S. at 591 (noting number of Justices who believed that *Bakke* so held), it does not follow necessarily that Congress affirmatively intended to license – or fund – practices, no matter how extreme or unnecessary the exclusionary effects. The language of Sections 601 and 602 is equally plausibly read, as it was by the Court in *Choate*, as enacting a government-wide minimum, while delegating "to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts" – or, simply as leaving it to the Executive Branch to take what measures it deemed reasonable or necessary to effectuate the Section 601 prohibition. There is no logical inconsistency between a legislative decision to forbid funding of intentional discrimination government-wide and a delegation to agencies of the power to withhold funds from (certain) practices that are the "functional equivalent" of intentional discrimination.

Indeed, the case widely cited as establishing the central importance of intent inquiry in Equal Protection analysis, *Washington* v. *Davis*, 426 U.S. 229 (1976), supports, rather than contradicts, the legislative approach described in *Choate*. Although the Court's opinion in that case expressed concern about the consequences of constitutionalizing disparate impact analysis, *Davis* can not be read as suggesting that disparate impact analysis is universally inappropriate – or incompatible with the constitutional command. Instead, just as the 88th Congress delegated to administrative agencies the responsibility for determining in the first instance whether and what sort of disparate impact analysis is needed, *Washington* cited with approval statutory settings in which Congress had enacted a

disparate impact standard, indicating that extensions of the principle should be a matter of political, rather than judicial, "prescription." 426 U.S. at 248.[8]

To the extent that the Legal Foundations ground their argument on a general "principle" that a provision can never be "effectuated" by regulations that prohibit conduct that it does not itself outlaw, they are not on firm ground. The Court rejected precisely that argument in *United States v. O'Hagan*, 521 U.S. 642, 673 (1997), which affirmed that Security and Exchange Commission Rule 14-e-3(a), requiring disclosure of trading based on nonpublic information concerning tender offers, was a permissible exercise of regulatory authority conferred by Congress.

Noting that the SEC had been vested with power both to "'define' and 'prescribe means reasonably designed to prevent' 'acts and practices' which are 'fraudulent,'" the Court rejected arguments that the regulation had "redefined" "fraudulent" and "manipulative," giving them broader effect than had controlling judicial constructions. Whether or not the imposition of the new duty was a permissible exercise of the Commission's delegated authority to "define," the Court explained,"Rule 14e-3(a) * * * could be sustained as a 'means reasonably designed to prevent' fraudulent trading on material, nonpublic information in the

[8]The intensity of judicial scrutiny that a contrary ruling in *Davis* would have triggered is different in kind from what has been applied under Title VI. See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) (any practice with "substantial legitimate justification" is presumptively legal under Title VI); *In re Alabama Employment Discrimination Litigation*, 198 F. 3d 1305, 1322 (11th Cir. 1999) (defendant's showing in Title VII impact case is "on an entirely different evidentiary planet than demonstrating a compelling interest; it is a rare day, indeed, that courts find government actors to have adequately demonstrated a compelling interest, and a rarer one still that courts find no less restrictive alternative available").

tender offer context." According to the Court,

> A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited. * * * * * § 14(e)'s rulemaking authorization gives the Commission "latitude," even in the context of a term of art like "manipulative," "to regulate nondeceptive activities as a 'reasonably designed' means of preventing manipulative acts, without suggesting any change in the meaning of the term 'manipulative' itself." We hold, accordingly, that under § 14(e), the Commission may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is "reasonably designed to prevent ... acts and practices [that] are fraudulent."

Id. at 672-73 (citations omitted); see also *id.* ("Because Congress has authorized the Commission, in § 14(e), to prescribe legislative rules, we owe the Commission's judgment more than mere deference or weight * * * * we must accord the Commission's assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'") (quoting *Batterton v. Francis*, 432 U.S. 416, 424-26 (1977) and *Chevron*, 467 U.S. at 844).

Rust v. Sullivan, 500 U.S. 173 (1991), is to similar effect. There, the Court held, *inter alia*, that the statutory provision forbidding recipients of federal family planning support to expend federal funds on abortion-related counseling, 42 U.S.C. § 1008, supplied authority for a regulation requiring recipients to maintain separate facilities, personnel, and records for their federally-funded and abortion-related activities. Although there was no suggestion that Congress had intended for such complete separation (and substantial, if inconclusive, evidence of a contrary intention), the Court accepted the Secretary's explanation that, absent such separation, the "distinction

between the recipients' title X and other activities may not be easily recognized, [and] the public can get the impression that Federal funds are being improperly used for abortion activities." *Id.* at 188 (quoting 53 Fed. Reg. 2940 (1988)) (emphasis supplied).

But not only is the Legal Foundations' proposed reading of Title VI not the only interpretation of Congress's intention, it is by far the least plausible of the available alternatives. First, even if *Bakke* is read as holding that Congress intended that the Section 601 prohibition would track the "constitutional" (discriminatory purpose) standard under all circumstances, see 438 U.S. 265, 287 (Opinion of Powell, J.) (1978); *id.* at 328 (Brennan, J., concurring in part and dissenting in part), that decision cannot be bootstrapped into an affirmative intent to disallow effects regulations. To the contrary, four of the five Justices whose votes in *Bakke* are invoked as establishing the "intent" reading of Title VI signed an opinion that repeatedly and approvingly referred to the existing regulations, including ones that indisputably went beyond the prohibitory force of the Equal Protection Clause. See, *e.g.*, 438 U.S. at 344. Moreover, the repeatedly expressed congressional concern that public funds "not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination," see, *e.g.*, 110 Cong. Rec. 6543 (Sen. Humphrey) hardly suggests a manifesto against disparate impact analysis, let alone an affirmative directive that agencies fully fund recipient activities that this Court has called "functionally equivalent" to purposeful discrimination.

The "contemporary legal context," *Cannon*, 441 U.S. at 699, renders even more implausible the notion that the 88th Congress specifically intended to withhold authority to promulgate "effects" regulations from the power conferred by Section 602. When Congress first set about prohibiting "discrimination" under Section 601 – and authorizing

administrative agencies to effectuate that directive – the distinction between intent and impact was not a central feature of Equal Protection doctrine. To the contrary, leading decisions of this Court suggested that impact alone sufficed to establish a constitutional violation, and decisions such as *Palmer* v. *Thompson*, 403 U.S. 217, 224-25 (1971), indicated that analysis of legislative motive was strongly discouraged.

In point of fact, it is not merely that traditional statutory construction aids fail to support the suggestion that Congress intended to foreclose 602 regulations incorporating the effects test. Rather, the text, structure, and history of Title VI strongly suggest that regulations of the sort resisted here are precisely what Congress contemplated when it delegated "effectuating" authority. See *Schor*, 478 U.S. at 847 (courts should not "reject plain evidence of congressional intent because that intent was not specifically embodied in a statutory mandate").

To begin with, the statutory text and structure make plain – and the legislative history confirms – that Congress intended for administrative rulemaking to play a central part in the Title VI scheme. By its terms, the statute does not merely authorize effectuating regulations – it "directs" their promulgation (and subjects them to presidential approval), and the remedies provided in the text of the statute are triggered by noncompliance with "any requirement adopted pursuant to [Section 602]." 42 U.S.C. 2000d-1. The reticence of Title VI's congressional supporters to enact a single, textual definition of "discrimination" has itself been explained in terms of preserving administrative "flexibility," *Bakke*, 438 U.S. at 339 (Brennan, J.).

Against this background, it is especially significant that the Executive Branch, which played a central role in drafting the language of Title VI and the first set of agency regulations, included "effects" prohibitions indistinguishable from those the Foundations would now have the Court hold unauthorized. See

29 Fed. Reg. 16274-16305 (1964) (regulations of seven agencies, all including disparate impact rules); *Zuber v. Allen*, 396 U.S. 168, 192 (1969) (interpretation of a statute by administrators who participated in drafting it carries "most weight"). While legislative inaction is not always the most reliable interpretive guide, it would betray an "awkward frame of mind," Pet. Br. at 26, if Congress had intended that federal agencies not include "discriminatory effects" regulations among those they were directed to promulgate, yet sat idly by as almost every agency of the United States government contravened this supposedly specific intent.

Finally, as noted above, the thirty-five years since promulgation of the first disparate impact rules have been unusually rich in explicit and implicit congressional endorsements of those regulations. The multiplicity of statutes expressly directing federal agencies to promulgate "provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964," see, *e.g.*, 15 U.S.C. § 775, combined with amendments of Title VI itself enacted with full knowledge of the (judicially approved) administrative construction, and still other legislation consciously intended to incorporate the Title VI model, requires that Section 602 be construed as authorizing the regulations. *Fausto*, 484 U.S. at 453 (even if a statute "may have a range of plausible meanings" when first enacted, "the implications of a statute may be altered by the implications of a later statute").

B. The Regulations Are Reasonable

The burden of persuading a court to reject as "unreasonable" an agency's judgments – pursuant to expressly delegated authority – concerning what rules and requirements will effectuate a statutory provision entrusted to its administration is a heavy one under any circumstances, and that

difficulty must be exponentially greater in a case such as this one, where the regulations challenged were contemplated by the legislature; where they have remained unchanged for decades; and where they have received the explicit endorsement of this Court and numerous subsequent Congresses. Cf. Laurence H. Silberman, *Chevron – The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 812, 828 (1990) (when "legislation comes rather near to authorizing directly the agency's order under review * * * * the second step is rather easy: the agency's interpretation is almost surely permissible").

In essence, Petitioners and *Amici* claim: (1) that the constitutional and impact standards are so inimical that the regulations cannot fairly be described as "effectuating" congressional objectives; and (2) that the consequences of the disparate impact regulations are so intrusive and "undesirable," WLF Br. at 22, as to require (belated) judicial invalidation. These criticisms are neither accurate nor sufficient to support the extraordinary step the Court is asked to take.

At the outset, the "burden" associated with pursuing objectives in ways that avoid unnecessary exclusionary impact is not an obviously heavy one, especially where the remedies for noncompliance are nonmonetary and prospective. See generally *Gebser*. And the claims by Petitioners and *Amici* that effects regulations threaten a vast intrusion into existing state prerogatives must be considered in light of the fact that Title VI regulations are binding only on those entities which freely chose to accept federal funds and which, as did Petitioners did here, give assurance that they will refrain from the practices proscribed by the agency rules. Thus, not only are federal fund recipients free to make their arguments concerning the "desirability" of the regulations to the political accountable branches, see *Chevron*, but they remain at liberty to decide for themselves that the "price" – complying – of federal funding is too high.

As for the assertions that a decision affirming the Court of Appeals will open litigation floodgates, the most powerful refutation is the fact that the very regulations predicted to have so destabilizing an effect have been on the books, unchanged, for nearly four decades (and have been held privately enforceable for almost that entire time). As Petitioners' *Amici* are constrained to concede, the number of lawsuits filed has been quite modest, and even those suits have met with only limited success (the most frightening prediction that the Washington Legal Foundation can fairly muster on the subject is that an affirmance in this case might be "expected" to lead to a "sharp uptick" in litigation under the regulations). WLF Br. at 24 n.8.

Nor do *Amici*'s professions of "difficult[y in] discern[ing]" how impact regulations "could be said to 'effectuate' the provisions of § 601," WLF Br. at 18-19, ring true. There is, of course, an obvious way to read the statute as supporting the regulations: the way the Court did in *Alexander* v. *Choate*. As has been summarized above, the circumstances surrounding Title VI's original enactment strongly suggest that Congress envisioned that, through operation of the regulations, the government would withhold funds based solely on the extreme and unjustifiable impacts of recipients' activities.

But under any circumstances, the assertion that a vast gulf separates the impact and intent standards is itself doubtful, and the link between "effects" regulations and intentional discrimination is not hard to discern. First, although it is a truism that "impact alone" is not the same as intentional discrimination, evidence of disproportionate burden will usually "provide [the] * * * starting point" of the Equal Protection inquiry, *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); see also *Washington* v. *Davis*, 426 U.S. at 254 (Stevens, J., concurring) ("When the disproportion is * * * dramatic* * * , it really does not matter whether the standard is phrased in terms of purpose or effect"), and there is a substantial

convergence between the two standards, in practice. See, *e.g.*, *Connecticut* v. *Teal*, 457 U.S. 440, 446-47 (1982) (plaintiff may prevail "if he shows that the employer was using the practice [having a disparate impact] as a mere pretext for discrimination"); *Watson*, 487 U.S. at 987.

Moreover, requiring that recipients refrain from practices for which there are obvious nondiscriminatory alternatives operates to deter and prevent the sort of taxpayer-funded, intentional discrimination that no one doubts to have been Title VI's core concern. See *Teal*, 457 U.S. at 449 (describing disparate impact as a "prophylactic" measure); *In re Alabama Employment Discrimination Litigation*, 198 F. 3d 1305, 1322 (11th Cir. 1999) (If "after a prima facie demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's use of the discriminatory practice?").

The effects standards also serve the important function of assuring that federal funds do not operate to aggravate, deepen, or "entrench," inequalities caused by intentional discrimination (either that of the recipient or a non-recipient third party). Cf. *Gaston County* v. *United States*, 395 U.S. 285 (1969). Thus, along the lines recognized by this Court in the Title VII setting, to fund practices "simply on the basis of their facial neutrality or on the basis of the [recipient's] lack of discriminatory intent" can "perpetuat[e] [– with taxpayer money –] the effects of pre-Act discrimination,"*Watson*, 487 U.S. at 988; see also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 806 (1973). (impact rules assure that earlier discrimination does not "work a cumulative and invidious burden on [minority] citizens for the remainder of their lives").

The results standards also effectuate another key objective of Title VI: Congress's strong preference for

consensual resolution. *See Gebser*; *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). As this Court has recognized in other settings, a discriminatory intent requirement can be inefficient and divisive, requiring those disadvantaged to cast aspersions on the motives of decision makers – often times stiffening that entity's resolve not to compromise.

Finally, the claims of incursion into State sovereignty and of executive overreaching – insubstantial as they are by their own terms – should carry even less weight with respect to Title VI. The statute is addressed to a subject – race and national origin discrimination – where the balance between local and federal power has shifted most decisively, see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Cannon*, 441 U.S. at 708, and where the central role of the Executive has been established through long practice. See *Bob Jones Univ.*, 461 U.S. at 593-95, 597-601 (1983).

CONCLUSION

For the reasons cited herein and in the Brief of Respondent Martha Sandoval, *et al.*, *Amici Curiae* respectfully submit that the judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

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APPENDIX

DESCRIPTIONS OF *AMICI CURIAE*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted LDF's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). LDF has litigated many cases under Title VI of the Civil Rights Act of 1964 and its implementing regulations, *see, e.g., Bazemore v. Friday*, 478 U.S. 385 (1986); *Alexander v. Choate*, 469 U.S. 287 (1985), and the outcome of this case will affect LDF's continued ability to ensure that federally-funded programs provide equal treatment for African Americans.

The Puerto Rican Legal Defense and Education Fund (PRLDEF) is a national civil rights legal organization dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos. PRLDEF has litigated many cases under Title VI of the Civil Rights Act of 1964 and its implementing regulations, including *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983). The resolution of this case will have a significant impact upon the extent to which PRLDEF and other civil rights organizations can protect the civil rights of their constituencies.

The Lawyers' Committee for Civil Rights Under Law was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes past presidents of the American Bar Association, past Attorneys General of the United States, numerous law school deans and many of the nation's leading lawyers. It has local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, DC. Through the

Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee is a tax-exempt, nonprofit civil rights organization. Among its essential interests is the proper construction and implementation of Title VI of the Civil Rights Act of 1964, as well as of the regulations that give life to the statutory promise of nondiscrimination in federally-assisted programs.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF has throughout its long history fought for the rights of equal access to government for its constituents. Title VI's disparate impact regulations and guidelines have been an important part of that advocacy. English-only services exclude many Asians and other immigrants from access to their government and from many services and benefits that are available to others.

The National Health Law Program (NHeLP) is a non-profit, legal support center that works on behalf of low income people, children, people with disabilities, and people of color. NHeLP has focused on problems limited English speaking individuals encounter when seeking health services. In addition to conducting research on this issue, NHeLP has filed administrative and judicial complaints on behalf of individuals who are seeking to enforce Title VI and its regulations.

The Center for Constitutional Rights ("Center") is a national, non-profit, legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution. Founded in 1966 during the Civil Rights Movement, the Center has a long-standing history of

assisting those people who, as a result of discriminatory policies, practices and effects, have been denied the rights, benefits, and privileges attendant to living in the United Sates. As part of its advocacy and litigation on behalf of those whose civil and constitutional rights have been violated, the Center has and continues to litigate cases under Title VI of the Civil Rights Act of 1964 and its implementing regulations.

The Center for Law in the Public Interest (CLIPI) in Los Angeles, California, was established in 1973 as one of the nation's first non-profit, public interest law firms. It is dedicated to policy-oriented litigation, counseling and advocacy, primarily in the areas of civil rights, education, environmental protection and land use, and consumer protection. CLIPI represents public-minded individuals, civil rights and other advocacy organizations, neighborhood coalitions, homeowner groups and environmental organizations. CLIPI has engaged in extensive advocacy and litigation under Title VI of the Civil Rights Act of 1964 and its regulations, and the outcome of this case will affect CLIPI's ability to ensure equal justice for all.

Dec 13, 2000

No. 99-1908

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF CENTER ON RACE, POVERTY AND THE ENVIRONMENT, NLG/MAURICE AND JANE SUGAR LAW CENTER FOR SOCIAL AND ECONOMIC JUSTICE, FLINT GENESEE UNITED FOR ACTION, JUSTICE AND ENVIRONMENTAL SAFETY, RESIDENTS OF SANBORN COURT, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INSTITUTE FOR PUBLIC REPRESENTATION, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND COMMUNITIES FOR A BETTER ENVIRONMENT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether individuals who have been injured by a federally funded entity's violation of Title VI regulations, issued pursuant to Section 602 of the Civil Rights Act of 1964, may bring a private action against the violator to end the discriminatory behavior.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Lawyers' Guild/Maurice and Jane Sugar Law Center for Social and Economic Justice (the Guild Law Center or GLC)[1] is a national public interest law center that focuses on economic and environmental justice issues. The GLC represents *amicus* FGUA in their Title VI administrative claim pending before the Environmental Protection Agency (EPA), and has worked extensively on behalf of low income and minority communities addressing environmental justice issues. The GLC's ability to effectively represent its client groups will be affected by the decision in this case.

Flint-Genesee United for Action, Justice and Environmental Safety (FGUA) is a non-profit community organization formed in opposition to the Genesee Power Station, a wood waste incinerator/electrical generator located in a predominantly African-American community in Flint, Michigan. FGUA participated in filing an administrative complaint under the EPA's Title VI regulations to challenge the permitting process. The complaint was filed in December 1992 and has been under investigation since January 1995.

The Center on Race, Poverty and the Environment (CRPE) is a national environmental justice organization,

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[1] *Amici curiae* file this motion with the consent of all parties. The written consent is on file with the Court. Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity, other than *amici* and their counsel, has made a monetary contribution specifically for the preparation or submission of this brief.

which represents low-income communities in environmental disputes. CRPE represents 28 community groups and individuals in six states who have filed Title VI administrative complaints with the EPA, and the Departments of Energy, Housing and Urban Development, the Interior and Transportation. CRPE's ability to represent its clients will be directly affected by this case.

Residents of Sanborn Court (RSC) is an unincorporated community group made up of residents of the Sanborn Court housing development in Salinas, California. RSC's membership is more than 95% Latino and primarily farmworkers. RSC filed a Title VI administrative complaint with the EPA in August 1995, alleging discriminatory impact from the siting of a toxic waste facility one block away. No decision has been reached on that claim.

The Institute for Public Representation (IPR) is a public interest law firm and clinical education program at the Georgetown University Law Center. Attorneys and law students at IPR represent individual and organizational clients in a wide range of civil rights and environmental law cases. IPR attorneys have worked extensively on environmental justice issues, focusing on the problems facing low-income and minority communities in the District of Columbia area. IPR's ability to represent these clients will be directly affected by the decision in this case.

New York Lawyers for the Public Interest (NYLPI) is a non-profit law firm that works in three project areas: access to health care, environmental justice and disability rights. NYLPI directly represents individuals throughout

New York City and New York State and, also, harnesses the resources of more than eighty of New York's law firms and corporate legal department to provide free legal assistance to community organizations and not-for-profits. NYLPI's ability to represent clients in communities across New York on issues of discrimination on the basis of race and ethnicity will be directly affected by the decision in this case.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national non-profit organization whose mission is to protect and promote the civil rights of the more than 30 million Latinos living in the United States. This litigation raises important issues relevant to the ability of the organization and the petitioners they represent to challenge discrimination through Title VI actions, particularly in the areas of education and public resource equity. MALDEF relies on the regulations promulgated under Title VI as a means to effect justice in lawsuits filed against agencies receiving federal funds.

Communities for a Better Environment ("CBE") is a California-based environmental health and justice organization with members throughout the state. For over twenty years, CBE has used science, law, and organizing to improve the urban environment in California. CBE believes that access to the courts to redress injuries is an important tool for all people, especially for members of minority groups who face disproportionate burdens from discrimination and the effects of environmental degradation.

SUMMARY OF ARGUMENT

A private right of action to enforce the regulations adopted to implement Title VI is entirely consistent with the purpose and history of that civil rights statute. The legislative history of Title VI shows that Congress intended for § 601, which grants individuals protection from discrimination in federally-funded programs, to be read together with § 602, which requires agencies to adopt regulations implementing and effectuating § 601. As a result, the unquestioned private right of action to enforce the statute must extend to the precise types of discrimination identified by agencies in the regulations. Since the passage of Title VI and the implication of a private right of action under § 601, Congress has amended the statute on many occasions and, in doing so, ratified this construction.

Implication of a private right of action to enforce the regulations adopted under Title VI is also consistent with Congress' intent to ensure effective protection of the individual rights created in the statute. Administrative enforcement has experienced serious backlogs and a demonstrated inability to effectively ensure compliance with Title VI regulations. Because administrative enforcement alone has not and cannot reach all prohibited discriminatory behavior, private enforcement is essential to effectuate the statutory goal of ensuring that federal funds do not perpetuate discrimination. Moreover, the availability of a private right of action has not resulted and will not result in the flood of litigation or "parade of horribles" presented by Petitioner and many of the *amici* filing in support of Petitioner. Lower courts, including nine federal circuits, have allowed such actions for over

two decades without overwhelming their dockets or subjecting recipients of federal funds to unlimited liability. Disparate impact claims under Title VI regulations will continue to be appropriately limited by the standards of liability and burdens of proof imposed by courts, as they have been for years.

ARGUMENT

The availability of an implied private right of action under any law hinges ultimately on Congressional intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979). Courts have looked to several factors to determine Congressional intent, including: 1) the purpose and structure of the particular law; 2) Congressional explanations of its function; 3) the necessity of a private right of action to fulfill the purposes of the law; and 4) compatibility of such an action with the law. *See id.* at 17-19; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568-70 (1979); *Cort v. Ash*, 422 U.S. 66, 78 (1975). In this case, Congressional intent to create a private right of action expansive enough to enforce Title VI regulations is demonstrated by the Act's purpose, which was to provide a broad individual right to be protected from racial, ethnic and national origin discrimination, and the structure of the Act, which makes private enforcement necessary to achieve this goal.

I. CONGRESS INTENDED TITLE VI TO CREATE A BROAD PERSONAL RIGHT AGAINST DISCRIMINATION EXPANSIVE ENOUGH TO INCLUDE THE PROTECTIONS PROVIDED BY REGULATION.

Although Title VI was enacted both to prevent federal funds from supporting discriminatory programs and to give individuals an effective remedy against discrimination, *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979), the principal motivation was to protect and enforce individual rights, 110 Cong. Rec. 6561 (Sen. Kuchel), 11225 (Sen. Cooper). Given this predominant concern, this Court has already found that there is an implied private right of action directly under § 601 of Title VI, which prohibits discrimination in federally-funded programs. *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Cannon*, 441 U.S. at 693-94.

Section 601 alone, however, was not intended to provide the full measure of protection available under Title VI. Rather, by also passing § 602 of the Act, Congress directed federal agencies:

> " . . . **to effectuate the provisions of Section 2000d of this title** . . . by issuing rules, regulations, or orders of general applicability . . . "

42 U.S.C. § 2000d-1. (Emphasis added). Congress recognized that federal agencies were more familiar with the ways in which discriminatory behavior and decisions would manifest themselves in specific federally-funded programs and were most capable of crafting regulations designed to end those practices. *See* H. Rep. 914, 88th Cong., 2d Sess. (1964), Additional Views of George Meader, *reprinted in* 1964 USSCAN 2391, 2425; 110 Cong.

Rec. 1613. As a result, federal agencies promulgated the disparate impact regulations, which are the subject of this dispute.[2]

A careful review of the legislative history demonstrates that Congress intended §§ 601 and 602 to operate jointly to create a uniform system of rights and enforcement mechanisms. Congress characterized § 601 as setting the general policy and § 602 as establishing the more precise requirements and methods for implementation. In response to an argument that these sections were inconsistent, proponents of the legislation insisted that the sections must be read together to modify or inform each other and could not be read independently. *See* 110 Cong. Rec. 13378, 14345. Because Congress intended the law and its regulations jointly to define the duties of federal fund recipients and the corresponding individual right against discrimination, the private right of action available under Title VI must allow for judicial enforcement of both the statute and its implementing reguiations.

Indeed, courts have long assumed the availability of a broad private right of action, both in cases brought directly under the regulations and in cases brought to compel agency enforcement of them. In *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (1990), plaintiffs brought suit under the Administrative Procedure Act

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[2] *See, e.g.*, 28 C.F.R. §§ 42.104(b)(2)-(3) (Justice or DOJ); 29 C.F.R. §§ 31.3(b)(2)-(3) (Labor); 32 C.F.R. §§ 195.4(b)(2)-(3) (Defense); 49 C.F.R. §§ 21.5(b)(2)-(3) (Transportation or DOT); 34 C.F.R. §§ 100.3(2)-(3) (Education or DOEd); 45 C.F.R. §§ 80.3(2)-(3) (Health and Human Services or HHS); 40 C.F.R. §§ 7.35(b), (c) (EPA).

against the Department of Education (DOEd) for its failure to enforce fully Title VI. The D.C. Circuit found that the plaintiffs had a private right of action directly against the recipients of federal funding, who were allegedly violating Title VI. *Id.* at 750-51. Relying on *Cannon, supra*, the court found that "Congress considered private suits to end discrimination not merely adequate but in fact the proper means for individuals to enforce Title VI," and, because individuals had an adequate remedy under Title VI, the APA provided no additional relief. *Id. See also Washington Legal Foundation v. Lamar*, 984 F.2d 483, 485-86 (D.C. Cir. 1993). The same analysis has been applied to a recent action that sought to compel the Department of Transportation (DOT) to enforce its Title VI disparate impact regulations. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191-92 (4th Cir. 1999). In dismissing the plaintiffs' claim against DOT, the Fourth Circuit implicitly found that plaintiffs had a direct remedy against the funding recipients for violation of DOT's regulations and that this remedy was "not only 'adequate,' but, as the Supreme Court recognized, is preferable to a direct suit against the agency itself." *Id.* If Title VI regulations are not privately enforceable, victims of discrimination in federally-funded programs will be left without a remedy against either the federal agency that failed to enforce its regulations or the federally-funded entity that violated those regulations unless *Cavazos* and its progeny are revisited by the courts.

Since the passage of Title VI, Congress has consistently demonstrated its intention to allow for private enforcement of the Act as a whole. In 1968, Congress rejected an amendment to Title VI that would have

defined "discrimination" to include only intentional acts and, arguably, invalidated the disparate impact regulations then under consideration. *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 620 (1983) (Marshall, J., dissenting). Congress then expanded the availability of private suits by allowing for recovery of attorney's fees, 42 U.S.C. § 1988, and abrogating states' sovereign immunity from suit, 42 U.S.C. § 2000d-7. In 1988, four years after the Court's decision in *Guardians*, Congress amended Title VI to reverse a judicial interpretation narrowing the term "programs" and, despite repeated warnings that this amendment would greatly expand the reach of the private rights of action assumed to be available under Title VI regulations, chose not to preclude a private right of action or to limit the scope of the regulations themselves. *See* 134 Cong. Rec. 99-100 (Sen. Hatch), 4257 (Sen. Hatch), 18879-800 (Rep. Fields) (1988); *Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the House Committee on Education & Labor and the Subcommittee on Civil & Constitutional Rights of the House Committee on the Judiciary*, 99th Cong., 1st Sess. 734, 1095, 1099 (1985); *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 98th Cong., 2d Sess. 23-24, 153-54, 200 (1984).

While the action or inaction of subsequent Congresses is not determinative of the legislative intent behind the original measure, such consistent interpretations over the course of many years are entitled to weight. *See Federal Housing Admin. v. Darlington, Inc.*, 358 U.S. 80, 90 (1958). Congressional inaction can be particularly significant where Congress fails to correct a long-

standing and well-known administrative or judicial interpretation of a statute, despite having made substantive changes to other portions of the statute. *Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992); *Guardians*, 463 U.S. at 620-21 (Marshall, J., dissenting); *United States v. Rutherford*, 442 U.S. 544, 554 (1979). *See also Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379-81 (1982). This presumption is especially strong where the interpretation involves a matter of "considerable public controversy," as in the case of civil rights laws. *Guardians*, 463 U.S. at 620-21 (Marshall, J., dissenting). Since Congress was fully aware of the availability of a private right of action during its frequent debates over amendments to the statute, its apparent unwillingness to amend Title VI to preclude a private right of action under the regulations suggests that Congress has ratified both the disparate impact regulations and an individual right to enforce those regulations.

Petitioner and several *amici* argue that, despite the limited question presented in this appeal, this Court should invalidate the disparate impact regulations first promulgated more than 30 years ago, adopted by all federal agencies which distribute federal funds and applicable to all recipients of federal funds. Brief for Petitioners at 25-26; Brief *Amicus Curiae* of Pacific Legal Foundation and Center for Equal Opportunity (PLF Brief) at 5-12; Brief *Amicus Curiae* of Washington Legal Foundation et al. (WLF Brief). Assuming that the Respondent and/or other *amici* discuss more fully the procedural and substantive deficiencies of this argument, we will not address it here. We note, however, the terrible disruption to agency operations and the settled expectations of

recipients of federal funds that would be caused by invalidating these regulations at such a late date.

II. A PRIVATE RIGHT OF ACTION TO ENFORCE THE REGULATIONS IMPLEMENTING TITLE VI IS CONSISTENT WITH AND NECESSARY TO FULFILL THE PURPOSES OF TITLE V.

Petitioners assert that a private right of action to enforce Title VI regulations is unnecessary because of the existing administrative enforcement mechanism. Brief for Petitioners at 16-17. However, vesting exclusive enforcement responsibility in federal agencies was not the intent of the statute and the agencies do not have the capacity to be the sole enforcers of Title VI and its regulations. As the United States Commission on Civil Rights (USCCR) recently found, "Federal Title VI enforcement has been effectively dormant" and "[w]ith few exceptions, the Federal agencies . . . have disregarded Title VI enforcement." USCCR, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* iii (June 1996) (*Federal Title VI Enforcement*).

A. Administrative Enforcement Alone is Insufficient to Ensure Compliance With Title VI Regulations.

Under the model regulations adopted by the Department of Justice (DOJ) and, with limited modifications, by every other federal agency, individuals who believe that a recipient of federal funds has violated Title VI or its regulations can file a complaint with the relevant federal agency. 28 C.F.R. § 42.107(b) (DOJ). *See also* 29 C.F.R.

§ 31.7(b) (Labor); 32 C.F.R. § 195.8(b) (Defense); 34 C.F.R. § 100.7(b) (DOEd); 45 C.F.R. § 80.7(b) (HHS); 40 C.F.R. § 7.120(a) (EPA). The funding agency must then investigate the claim to determine if Title VI or its regulations have been violated before withholding funds or referring the case to the Department of Justice. 42 U.S.C. § 2000d-1. However, without addressing the reasons, possible motives or underlying circumstances, the funding agencies have not been able to investigate properly and resolve all meritorious claims.

1. The agencies' record demonstrates that administrative enforcement alone cannot fulfill the purposes of Title VI and its implementing regulations.

Agencies must address many goals with limited resources and are likely to view enforcing agency-specific, technical regulations as more central to their mission than preventing racial or other discrimination. As a result, as documented by the USCCR, many have underfunded and understaffed their civil rights enforcement programs. *See* USCCR, *Federal Title VI Enforcement, supra,* 14-18. This Court has also recognized that federal agencies, faced with civil rights complaints, may "simply decide not to investigate – a decision that often will be based on a lack of enforcement resources, rather than any conclusion on the merits of the complaint." *Cannon,* 441 U.S. at 707 n.41.

In periodic evaluations of the success of federal enforcement of Title VI and its implementing regulations, the USCCR has consistently found that the agencies

reviewed had not provided sufficient resources to the effort, coordinated their actions across agencies effectively or developed adequate enforcement procedures. USCCR, *The Federal Enforcement Effort* (1970); USCCR, *The Federal Enforcement Effort – Seven Months Later* 55-56 (May 1971); USCCR, *The Federal Enforcement Effort – One Year Later* (Nov. 1971); USCCR, *Federal Title VI Enforcement, supra,* at 17. Evaluations by both the General Accounting Office and the Coordination and Review Section of DOJ's Office of Civil Rights confirmed that federal agencies, on the whole, were not living up to their Title VI enforcement responsibilities. USCCR, *Federal Title VI Enforcement, supra,* at 16-17 (citing U.S. General Accounting Office, *Agencies When Providing Federal Financial Assistance Should Ensure Compliance with Title VI,* Rept. No. 112,063 (Apr. 15, 1980); DOJ, Civil Rights Division, "Title VI – Fifteen Years Later," *Title VI Forum,* vol. 4, no. 2 (Fall 1979)).

Many federal agencies have developed a backlog of Title VI complaints. USCCR, *Federal Title VI Enforcement, supra,* at 646-58. For example, in 1998, the DOEd had a backlog of 747 civil rights complaints, 139 of which were likely to have been filed under Title VI. DOEd, Office of Civil Rights, *Annual Report to Congress: Guaranteeing Equal Access to High-Standards Education,* pp. 17-18 (1998) (1998 *Annual Report*). Despite this backlog, the USCCR lauded the DOEd for doing the *best* job of any federal agency to enforce Title VI. USCCR, *Federal Title VI Enforcement,* pp. 646-58.

The Department of Health and Human Services (HHS) also has a backlog of cases, although the number of complaints filed has decreased in recent years. USCCR,

The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination and Ensuring Equality, Vol. II: The Role of Federal Civil Rights Enforcement 172 (1999) (*Health Care Challenge, Vol. II*). By fiscal year 1998, one-third of the 134 complaints being actively investigated by HHS had been carried over from a previous year. *Id.* at 181. The agency was only able to close 71 of those cases during 1998, leaving 63 cases to be carried over to 1999. *Id.*

HHS' ability to enforce Title VI has always been limited. *See, e.g.*, David Barton Smith, *Health Care Divided: Race and Healing a Nation* 317-20 (Ann Arbor: Univ. of Mich. Press 1999); Michael Meltsner, *Equality and Health*, 115 Penn. L. Rev. 22 (1966). An independent review conducted in the 1960s found that "[e]ven when persistent violations have been discovered . . . , sanctions have not been imposed, and so violations of constitutional rights often continue unabated." Meltsner, *supra*, at 25-26. For example, although Medicare required Title VI certification of hospitals as a condition of participation, nursing homes and other forms of health care were not subject to field audits and remained substantially segregated. Barton Smith, *supra*, at 226, 318-19. During the 1970s, civil rights enforcement at the Department of Health, Education and Welfare (HEW) fell prey to the concern that compliance activities would impede federal health planning, a competing priority for the agency. David Barton Smith, "Addressing Racial Inequalities in Health Care: Civil Rights Monitoring and Report Cards," 23 *Health Politics, Policy and Law* 75, 87 (1998).

A 1987 report by the House Committee on Government Operations found that HHS, which was then

providing in excess of $330 billion annually to nearly 230,000 health and social service agencies subject to Title VI, unnecessarily delayed Title VI case processing, allowing discrimination to continue; routinely conducted superficial and inadequate investigations; and failed to bring formal administrative or judicial enforcement in cases in which it had been unable to negotiate voluntary compliance. H. Comm. On Gov't Operations, *Investigation of the Office for Civil Rights in the Department of Health and Human Services* 3, 5, 16, 20 (April 15, 1987). Only last year, the USCCR found that HHS' complaint investigations continue to be "replete with problems," including insufficient staff training on investigative procedures, and the backlog has "resulted in considerable pressure to close cases, increasing the likelihood of cases being closed prematurely." *Health Care Challenge, Vol. II* at 172. Clearly, HHS does not have the resources or ability to enforce Title VI and its regulations fully on its own.

The EPA's enforcement record is similarly poor. Between December 1992[3] and October 2000, the EPA agreed to investigate 61 Title VI administrative complaints. Status Summary Table of EPA Title VI Administrative Complaints (10/04/00) ("Status Summary Table") located at *http://www.epa.gov/ocrpage1/docs/t6stoc2000.pdf.*

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[3] The first Title VI disparate impact complaint was filed with the EPA in December 1992, but, because the EPA had no procedures for handling such complaints, it was filed, and then misplaced until the GLC filed a second complaint about the same facility on behalf of FGUA on July 6, 1994. The EPA accepted the complaint for investigation in January 1995 and, almost six years later, is still analyzing the claim with no decision in sight.

As of October 4, 2000, 57 of those complaints were still pending. *Id.* Eleven had been pending for more than five years. *See* Title VI Complaints Filed With EPA (10/04/00) ("Complaints Filed"), located at *http://www.epa.gov/ocrpage1/docs/t6soct2000.pdf.* In fact, during its entire eight-year history of Title VI complaint investigation, the EPA has decided only *one* case on the merits. Complaints Filed, p. 10.

The failure to resolve these administrative complaints harms individual complainants in concrete ways. The USCCR recently found that "there remain[s] tremendous racial and gender disparities in access to quality health care services," many of which are the result of HHS' failure "to enforce the crucial nondiscrimination provisions of the Federal civil rights laws with which it is entrusted." *Health Care Challenge, Vol. II, supra,* at 274.[4]

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[4] Egregious examples can be found in the administrative dockets of other federal agencies as well. For instance, six years ago, the EPA agreed to investigate *amicus* FGUA's Title VI complaint, mentioned in fn. 2, *supra,* regarding the issuance of a permit to a wood waste incinerator located in a predominantly African-American community. Because the facility would burn construction and demolition debris, much of which could contain lead paint, it threatened to emit lead at a level harmful to a community already overburdened with environmental hazards and, as in many African-American communities, housing a disproportionately high percentage of children with elevated blood lead levels. FGUA asserted that the cumulative impact of these emissions and the other environmental hazards on this vulnerable population resulted in an adverse disparate impact in its community, in violation of EPA's Title VI regulations. The State agency refused to consider any of these issues in its permitting decision, relying entirely on compliance with generic federal and state emission limits. While this facility

The delay itself compromises the ability of these complainants to enforce their rights in other fora as the passage of time means that witnesses become unavailable, agency personnel changes and institutional memory fades.

Given limited staff and funding and multiple goals, federal agencies will always be forced to circumscribe and prioritize their enforcement efforts under their Title VI regulations. If individuals are limited to the administrative process to enforce their civil rights, many will continue to suffer discrimination in federally-funded programs, contrary to the direct mandate of Title VI.

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emits lead at potentially harmful levels, the EPA continues to "study" the matter.

Similarly, *amicus* RSC was faced with a government agency that had permitted all three of California's toxic waste dumps to be located in farmworker communities that ranged from 65% to 95% people of color, and which permitted a toxic waste treatment facility one block from the Sanborn Court housing complex, in an 84% Latino neighborhood. In response, RSC filed a Title VI complaint with the EPA in August 1995, alleging disparate impact and disparate treatment by California's Department of Toxic Substances Control. RSC's worst fears about the nearby toxic waste facility were realized when the facility dumped toxic chemicals down the drain, and when repeated accidents at the facility sent one worker to the hospital, sent clouds of toxic ammonia into the surrounding neighborhood, and forced local regulatory agencies to shut the plant down. While this facility has closed, RSC's concerns about the permitting process itself remain unaddressed. Over five years after RSC's complaint was filed, the EPA has still not made the basic determination of whether to even *accept* the complaint for investigation, despite the requirement within its regulations that such a determination be made within 20 days, 40 C.F.R. § 7.120(d)(1)(i).

Certainly, it was not the intent of Congress to leave an aggrieved individual's ability to seek redress subject to the resources and priorities of an overburdened federal agency.

2. The process for administrative enforcement of Title VI regulations does not allow full or effective participation by individual complainants.

Our judicial system is premised on the notion that directly affected individuals have the strongest incentive to pursue their claims vigorously and participate in litigation in a way that ensures full and fair resolution of complaints. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). Accordingly, even with a statutorily-provided administrative process, a private right of action may be necessary where the administrative process "does not assure [the specially benefitted class] the ability to activate and participate in the administrative process contemplated by the statute." *Cannon*, 441 U.S. at 706, n.41.

As reflected in the *amicus* brief filed below by the United States, federal agencies have long assumed that individuals can enforce their rights under the Title VI regulations in federal court. Brief for the United States as Intervenor and as *Amicus Curiae*, at Section II.B. Accordingly, most agencies have designed their Title VI enforcement procedures to simplify the investigation for the funding agency rather than to provide a forum for individual complainants to be heard. The resulting administrative enforcement process thus often marginalizes the

affected individuals, even though individual complainants have the greatest motivation to investigate thoroughly and persuasively present evidence demonstrating civil rights violations affecting them.

Generally, a complainant files an initial complaint, describing the alleged Title VI violation, but is not made a party to the proceeding. *See, e.g.*, 28 C.F.R. §§ 42.107(b)-(d), 42.110(b) (DOJ); 29 C.F.R. §§ 31.7(b)-(d) (Labor); 32 C.F.R. §§ 195.8(b)-(d) (Defense); 49 C.F.R. §§ 21.11(b)-(d) (DOT); 34 C.F.R. §§ 100.7(b)-(d) (DOEd); 45 C.F.R. §§ 80.7(b)-(d) (HHS); 40 C.F.R. § 7.120 (EPA). For example, under the EPA's policies, the agency itself has the only formal role in rebutting justification or mitigation defenses, EPA Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39650, 39683 (2000) (EPA Draft Guidance), even though the complainant has the greatest incentive and probably the best information to do so. Many agencies do not give complainants the right to participate in settlement negotiations, *see, e.g.*, DOEd, 1998 *Annual Report*, p. 8; EPA Draft Guidance, 65 Fed Reg. at 39673-674, although the agency may be most interested in compliance plans that prevent future discrimination rather than redressing the individual harm that generated the complaint. Moreover, the complainant has no administrative appeal if his or her claim is denied. *See, e.g.*, 28 C.F.R. §§ 42.108(c), 42.110(g)(2) (DOJ); 29 C.F.R. §§ 31.8(b), 31.10 (Labor); 32 C.F.R. §§ 195.9(c), 195.11 (Defense); 49 C.F.R. §§ 21.13(c), 21.17 (DOT); 34 C.F.R. §§ 100.8(c), 100.10 (DOEd); 45 C.F.R. §§ 80.8(c), 80.10 (HHS); 40 C.F.R. § 7.130(b) (EPA). *See also* DOEd, Office of Civil Rights,

Case Resolution Manual 12 (Feb. 1998); EPA Draft Guidance, 65 Fed. Reg. at 39683-684.

Congress has recognized the inherent problems in relying exclusively on administrative enforcement under Title VI. In 1976, Congress passed the Civil Rights Attorney's Fees Award Act, P.L. 94-559, 90 Stat. 2641 (1976) which allows individual Title VI litigants to be awarded attorney's fees under 42 U.S.C. § 1988. In so doing, Congress acknowledged individual lawsuits under the civil rights laws, including Title VI, as an integral part of its enforcement strategy and that such actions should be encouraged. Sen. Rep. No. 94-1011, 94th Cong., 2d Sess. 4-5, *reprinted in* 1976 USSCAN 5908, 5912, citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F.2d 591 (5th Cir. 1972); *United States Steel Corp. v. United States*, 385 F. Supp. 346 (W.D. Pa. 1974).

B. Allowing a Private Right of Action Is Consistent with the Goals and Structure of Title VI.

Although Congress intended Title VI to prevent future discrimination and provide a remedy for present discrimination, it preferred to accomplish this goal without punishing recipients of federal funds through withdrawal of their funding. 110 Cong. Rec. 1520 (Rep. Cellar), 1538 (Rep. Rodino), 13333 (Sen. Ribicoff); *see also Cannon*, 441 U.S. at 704. Because individual litigants are primarily "interested in obtaining a benefit for [themselves]," *Cannon*, 441 U.S. at 705, they are likely to request

personal, narrowly tailored relief that falls within Congress' intended result. Moreover, under existing case law, individuals acting as private attorneys general under the Title VI regulations are limited to prospective equitable remedies. *See, e.g., Guardians*, 592 U.S. at 601; *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 285-87 (1998). As the court below properly opined, the distinction between equitable and monetary relief is significant, especially as it applies to the enforcement of disparate impact regulations. *Sandoval v. Hagan*, 197 F.3d 484, 500, n.14 (11th Cir. 1999). Thus, individuals filing a private enforcement action under Title VI regulations are only able to invoke a limited subset of the remedies available to the funding agency, and thus to which federally-funded entities are already subject, and could not impose potentially punitive damages remedies.

Petitioner argues that private actions are inappropriate because they would circumvent the notice and settlement negotiation requirements imposed on funding agencies. Brief for Petitioners at 27-28. However, there is a significant difference between a lawsuit filed by an individual to compel compliance with Title VI and a Title VI investigation by a federal agency. If, upon investigation, a federal agency finds a Title VI violation, the agency has the discretion to choose the drastic remedy of administratively withdrawing federal funds, rather than asking the DOJ to file a federal lawsuit to compel compliance, with its attendant protections for the funded entity. Because a recipient of federal funds risks losing federal funds as soon as an investigation is begun, the pre-investigation notice and negotiation requirements imposed by Congress are necessary. With an individual

lawsuit, however, a recipient has by definition significant procedural protections, including notice of the nature of the claim and time to settle before any adverse action is taken, and is never at risk of losing its funding. Thus, the notice and settlement requirements are not aimed at private litigants and, in practical terms, an individual lawsuit provides comparable protections.

III. ALLOWING A PRIVATE RIGHT OF ACTION DOES NOT CREATE LEGAL UNCERTAINTY, IMPOSE ADDITIONAL BURDENS ON RECIPIENTS OF FEDERAL FUNDS OR OPEN THE "FLOODGATES OF LITIGATION."

The various *amici* supporting Petitioner argue that providing for a private right of action under the Title VI regulations would disrupt the settled state of the law, impose unreasonable burdens on recipients of federal funds and open the "floodgates of litigation" under these regulations. *See, e.g.*, WLF Brief at 23-25; Brief of *Amicus Curiae* National Association of Manufacturers (NAM Brief). These arguments miss the point and mischaracterize the state of the law. Title VI and its disparate impact regulations have been the law for three decades and suits have been filed under these regulations for more than 25 years. *See, e.g., Larry P. v. Riles*, 793 F.2d 969, 981-82 (9th Cir. 1984). Allowing this long-standing practice to continue will not "disrupt the settled state of the law," as it *is* the settled state of the law; nor will it create overwhelming amounts of private litigation.

A. Allowing a Private Right of Action Under Title VI Regulations Will Not Overly Burden the Courts.

Petitioners and their supporting *amici* devote significant time and effort raising the specter of unlimited and unmanageable litigation under a private right of action to enforce Title VI regulations. However, they provide no evidence to support this claim. It is noteworthy that the same claim was raised in an effort to prevent passage of the Civil Rights Act of 1964, and to prevent private rights of action under Title VI itself and under Title IX. *See Cannon*, 441 U.S. at 709. Such doomsday predictions have yet to be realized. On the contrary, the available evidence suggests that the number of private actions likely to be filed under Title VI's regulations is easily manageable by the courts.

Almost from the moment that Title VI and its implementing regulations were created, individuals have sought to enforce these provisions through private lawsuits. Nine federal circuit courts have assumed the existence of an implied private right of action under the Title VI regulations. *See, e.g., Latinos Unidos de Chelsea v. Secretary of Hous. & Dev.*, 799 F. 2d 774, 785 n.20 (1st Cir. 1986); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2nd Cir. 1995); *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999); *Castaneda by Castaneda v. Pickard*, 781 F.2d 456, 465 n.11 (5th Cir. 1986); *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Larry P.*, 793 F.2d at 981-82 (9th Cir.); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996); *Sandoval*, 197 F.3d 484 (11th Cir.). Despite this broad and long-standing recognition by almost every federal

appeals court of the right to sue under the disparate impact regulations, there has been no flood of lawsuits.

Many of the *amici* point to environmental justice claims as being one of the fastest growing types of disparate impact claims and potentially causing the greatest disruption in the judicial system. *See, e.g.*, NAM Brief at 15-19; WLF Brief at 24. The reality is otherwise. The EPA reports that during the last five years, local, state and federal agencies have granted more than 250,000 permits in the environmental context. During that time, there have been only *two* reported cases alleging violations of Title VI disparate impact regulations in permitting decisions. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 525 U.S. 974 (1998); *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996). Even if administrative complaints are considered, there is no reason for alarm. In the past eight years, the EPA has received 103 complaints, or roughly 13 annually. Status Summary Table.

In addition, the ease of filing an administrative claim compared to the difficulty of filing a lawsuit strongly suggests that fewer lawsuits than administrative claims will be filed. For example, to file a complaint with DOEd, an individual must simply send a letter including his name and address, a description of the person or class of person being discriminated against, the name and location of the agency that discriminated and a description of the discriminatory act. DOEd, Office of Civil Rights, *How to File a Discrimination Claim with the Office of Civil Rights*, located at *http://www.ed.gov/offices/OCR/howto.html* (Nov. 14, 2000). In comparison, to file a lawsuit, a complainant must conduct his own investigation, produce sufficient

evidence to prove his claim, obtain representation or represent himself, pay a filing fee and other significant costs, file formal pleadings, meet standing requirements and engage in extensive discovery. These additional burdens have already and continue to convince a substantial number of potential litigants to rely on the administrative process, whatever its limitations.

In fact, some of the administrative complaints that have actually been filed could support a private intentional discrimination lawsuit directly under the statute. For example, DOEd received complaints about a school district that segregated Latino students from the rest of the student population during both academic and non-academic classes without consideration of the Latino students' proficiency in English, as well as another school system that used different placement criteria for white and black students who had received similar scores on a test for learning disorders. DOEd, 1998 *Annual Report* at 26-27. Either of these complaints could have supported an intentional discrimination claim in federal court, yet the complainants in each case chose to use the administrative process instead. Given the burdens of litigation and the relative ease of filing administrative complaints, many individuals will continue to select the administrative process over litigation.

B. Allowing A Private Right of Action Under Title VI Regulations Does Not Impose New or Unworkable Burdens on Recipients of Federal Funds.

Title VI regulations are presently binding on all recipients of federal funds. As Justice Marshall noted in his dissent in *Guardians*, every applicant for federal funds is clearly notified that it must comply with Title VI and its implementing regulations and, in fact, signs a contract in which it agrees to do so. 463 U.S. at 629-30. Despite this fact, *amicus* NAM argues that allowing individuals to enforce Title VI regulations in the issuance of Clean Air Act permits would disrupt a settled area of law and impose additional obligations on state environmental protection agencies and on regulated industries. NAM Brief at 7-9. NAM ignores the fact that Title VI has, for 30 years, imposed a non-discrimination obligation on recipients of federal funds that is independent of other legal duties. Compliance with the Clean Air Act does not exempt recipients of federal funds from their obligations under Title VI. While a credible threat of enforcement may compel state agencies to develop procedures for ensuring compliance with the applicable Title VI regulations, it does not change or expand their existing legal duties. State environmental agencies can easily avoid disruption to their permitting process by including Title VI considerations in initial permitting decisions, as required, and taking active measures to address the health and environmental harms currently afflicting communities of color within their jurisdiction. *See* Draft Title VI Guidance

for EPA Assistance Recipients Administering Environmental Permitting Programs, 65 Fed Reg. 39650 (2000).

NAM also characterizes claims under the Title VI regulations in the environmental context as a "collateral attack on permits." NAM Brief at 19. Again, NAM fails to recognize that state environmental agencies that receive federal funds are presently required to comply with these regulations in issuing permits. A lawsuit challenging an agency's failure to comply with its existing legal obligations in issuing a permit is not a "collateral attack" on the permit.

Moreover, contrary to the assertions of Petitioner and their supporting *amici*, the judicial resolution of claims filed under Title VI regulations would not impose standardless and unknown burdens on recipients of federal funds. It is already well-established that disparate impacts are not *per se* a violation of Title VI. Rather, only "actions having an *unjustifiable* disparate impact on minorities" constitute a violation of Title VI disparate impact regulations. *Alexander*, 469 U.S. at 293 (emphasis added). *See also* Title VII, Civil Rights Act (CRA) of 1964 as amended by CRA of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), codified at 42 U.S.C. §§ 2000e, *et seq.*

Courts analyzing claims under the Title VI regulations have historically borrowed from the burden shifting scheme for disparate impact claims under Title VII. 42 U.S.C. § 2000e-2(k)(1)). *See, e.g., Sandoval*, 197 F.3d at 507; *Elston v. Talladega County Bd. of Ed.*, 997 F.2d 1394, 1407 & n.14 (11th Cir. 1993); *United States v. LULAC*, 793 F.2d 636, 648 & n.35 (5th Cir. 1986); *City of Chicago v. Lindley*, 66 F.3d 819, 828-29 & n.12 (7th Cir. 1995); *Larry P.*, 793 F.2d at

982 & n.9; *cf. Bd. of Ed. v. Harris*, 444 U.S. 130, 151 (1979) (borrowing from Title VII burden scheme to formulate defendant's burden in disparate impact case under Emergency School Aid Act). Under this analysis, if the plaintiff can make a *prima facie* showing that a particular policy or practice causes a disparate impact, the defendant must rebut by demonstrating that the challenged practice is "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

In the context of the Title VI regulations, courts have required that the policy or practice have a "substantial legitimate justification," which has been further defined as having a "manifest relationship" to, or being "necessary to meeting a goal that was legitimate, important, and integral" to, the recipient's "institutional mission." *See, e.g., Elston*, 997 F.2d at 1412-13; *New York Urban League, Inc.*, 71 F.3d at 1036; *Ferguson v. City of Charleston*, 186 F.3d 469, 480 (4th Cir. 1999); *Larry P.*, 793 F.2d at 982 & n.9 (requiring "educational necessity" in special education case under Title VI regulations); *cf. Harris*, 444 U.S. at 151 (suggesting "educational necessity" standard in Emergency School Aid Act case); *LULAC*, 793 F.2d at 648-49 (requiring "bona fide educational requirement" in educational testing case under Title VI regulations). If the defendant meets this standard, the burden then shifts back to the plaintiff to show that there is a "less discriminatory alternative" that would serve the defendant's mission. 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii), (k)(1)(C). *See, e.g., Sandoval*, 197 F.3d at 507; *New York Urban League, Inc.*, 71 F.3d at 1036; *Elston*, 997 F.2d at 1407. Thus, the Title VI regulations do not direct recipients to eschew any policy choice which will result in a disparate impact but only to

avoid causing a disparate impact without a substantial reason or when their goals could be reached through less discriminatory means.

Given this developed system of evaluating Title VI disparate impact claims, recipients of federal funds are well positioned to defend themselves against individual lawsuits. The threat of private lawsuits, while more likely to provide incentive for compliance than administrative enforcement alone, will not subject recipients to unlimited liability for their justifiable administrative decisions. Requiring recipients of federal funds to consider and attempt to address the racial disparities created by their policies and actions is neither unreasonable nor undesirable.

CONCLUSION

Both the history and purpose of Title VI support an implied private right of action to enforce the disparate impact regulations that Congress required federal agencies to issue. Because administrative enforcement efforts alone have proven incapable of effectively protecting individuals from prohibited discrimination in federally-funded programs, private enforcement of Title VI regulations is necessary to meet the statutory goal of providing individuals effective protection from discrimination in federally-funded programs. Individuals have used the courts to enforce Title VI and its regulations for more than 25 years. This experience has shown that individual enforcement of Title VI and its regulations, while crucial to meeting the goals of the statute, has not and will not

overwhelm the courts or subject recipients to unlimited liability.

Respectfully submitted,

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No. 99-1908

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

JAMES ALEXANDER, Director, Alabama Department of Public Safety, et al.,

Petitioners,

v.

MARTHA SANDOVAL, Individually and on Behalf of All Others Similarly Situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

Central Puget Sound Regional Transit Authority (hereinafter "Sound Transit") is a limited purpose government entity with authority to plan and construct high capacity transportation systems in a three county area in western Washington State. RCW 81.104 and RCW 81.112. Sound Transit has within its authority certain powers including, for example, taxation and condemnation, typical of other cities and counties in the State of Washington. The extent of its jurisdiction runs from Everett in Snohomish County, Washington, through Seattle, King County, Washington, and south to Tacoma, Pierce County, Washington. Sound Transit qualifies as a "similar entity" to a "city, county, town" pursuant to Rule 37(4). Desmond Brown, General Counsel for Sound Transit, is Sound Transit's authorized law officer. Accordingly, this Amicus Curiae brief may be filed without motion pursuant to Rule 37(4).

Sound Transit is currently a defendant in a lawsuit alleging, among other claims, a disparate impact claim under Title VI §602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Save Our Valley v.

Sound Transit, et al, U. S. Dist. Ct., W.D. Wash., No. C00-0715R. As described below, Sound Transit is significantly differently situated than the Petitioners in this case. Thus, by describing the disparate impact claim alleged against Sound Transit and why as a practical matter such a claim should fail, Sound Transit brings a unique perspective to the issue presented for review that is not addressed by the Petitioner or another amicus curiae.

SUMMARY OF ARGUMENT

Federal funds support a broad range of projects which are thus subject to the dictates of Title VI of the Civil Rights Act of 1964. Certain of these projects, such as the siting of large transportation systems, inherently result in impacts in the communities served by the project. Moreover, to the extent such projects seek to reach out to serve minority communities in otherwise predominately white jurisdiction, impacts from projects are likely to create statistical disparities. Thus, simply providing service to a minority community can create alleged disparate impacts sufficient to raise a prima facie Title VI §602 claim even though providing that service results in significant benefits to the minority community. Recognizing a broad

private right of action under Title VI § 602 thus creates disincentives for providing service to minority communities, a result that could not have been intended by Congress. Moreover, recognizing a private right of action unnecessarily injects the federal courts into the delicate political process of evaluating the benefits and burdens of large public projects.

The federal administrative oversight created under Title VI § 602 provides appropriate and sufficient assurance that federal funds not support discriminatory programs. The power of the federal purse and the exercise of expertise by federal agencies are more than sufficient means to assure that the local political process proceeds without discrimination and consistent with congressional intent. A private judicial remedy is not necessary.

ARGUMENT

Sound Transit submits this Amicus Curiae brief in support of Petitioners' argument that this Court should not recognize a private right of action under §602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The Petitioners and other supporting Amici have set out the legal arguments demonstrating why a private right of action should not

be recognized. Sound Transit will not repeat those arguments here. Sound Transit instead describes why recognizing a private right of action makes no sense and is contrary to congressional intent using its own experience siting a complex transportation system as an example.

I. LARGE PUBLIC PROJECTS SUCH AS TRANSPORTATION SYSTEMS HAVE INHERENT IMPACTS THAT SHOULD NOT GIVE RISE TO A FEDERAL CIVIL RIGHTS CLAIM

Unlike the placement of a single facility, such as a landfill, or adoption of a policy not involving physical placement of facilities, such as the case at bar, siting of transportation facilities necessarily involves creating impacts to any neighborhood to be served by the proposed transportation system. Thus, neighborhoods served by a new transportation system likely will suffer property displacements, noise, traffic, construction and like impacts. Ironically, the more service a government provides to a neighborhood with a greater corresponding benefit, the more impacts the government creates.

Moreover, if a government entity whose jurisdiction is overwhelming white seeks to serve a minority neighborhood, artificially high statistical impacts are created simply as a consequence of the decision to serve the minority neighborhood. Again, the more

intense the service provided to the minority community, the greater the apparent statistical disparity.

Thus, the siting of transportation system may appear to create disparate impacts. But the alleged disparity results solely because of the characteristics of the transportation system to be sited and the demographics of the areas that will be served. If a private right of action is recognized under § 602, government entities seeking to build complex facilities, such as transportation systems, will face costly, lengthy and uncertain legal challenges to decisions made that provide significant benefits to minority communities. The unintended result will be to discourage decisions to serve such communities.

Sound Transit's construction of a new light rail system exemplifies the problem. As noted above, Sound Transit is a limited purpose government entity with authority to plan and construct high capacity transportation systems. Sound Transit was created by way of public vote. The vote also authorized the imposition of taxes to pay for a new transportation system consisting of a new light rail line running from the University District in Seattle south to Seattle-Tacoma International Airport, a commuter rail line and a series of express

buses.

One of Sound Transit's principal tasks is the selection of the best alignment for its light rail system. Sound Transit is being sued under Title VI § 602 because of the alleged disparate impact of its decision where and how to align the light rail line system. The alleged disparity, however, results solely because of the nature of a light rail system and the demographics of the areas that the light rail system will serve.

Specifically, the claims against Sound Transit arise out of Sound Transit's decision to align a light rail route through the Rainier Valley in Seattle, Washington. The Rainier Valley is one of the most racially diverse areas in the Sound Transit district. The entire Sound Transit district is 16% minority and 84% white. Rainier Valley, in contrast, consists of three neighborhoods comprised of minority populations of 85%, 73% and 68%. Where such great demographic disparity exists, it be comes self-evident that providing service to a community such as Rainier Valley will inevitably result is statistical disparity in impacts. In fact, the greater the service provided, the greater the disparity. If a private right of action is recognized under

Title VI § 602, such disparity may in and of itself give rise to a prima facie case. A government may thus be thrust into court without regard to the benefits provided to the minority community and without regard to the political process governments must engage in to determine where to provide service.

Siting the alignment of a new light rail alignment in an existing urban landscape is a complex process that requires the elected branches of government to balance numerous and often conflicting objectives and ultimately to make difficult choices. For example, in the early 1990s the initial recommendation was to connect downtown Seattle to Seattle-Tacoma Airport in the quickest and least expensive manner by siting the route through an industrial area and to bypass and not serve the Rainier Valley. However, after significant community activism and political debate, this initial siting recommendation was reconsidered and ultimately reversed. Instead, an alignment was recommended through the Rainier Valley even though the Valley alignment was thought to be a more expensive and slower route to the airport. Central to the decision to site the route through the Rainier Valley was a desire to provide increased transportation benefits to

Rainier Valley residents and connect the Rainier Valley to the rest of Seattle.

Similar policy considerations were involved in deciding whether to build the alignment in a tunnel or at-grade in the Rainier Valley. Although a tunnel would provide faster travel times to the airport, it would not provide the benefits associated with an at-grade system that many policymakers desired for the Rainier Valley. The benefits from an at-grade alignment include significant streetscape improvements and other transit related development that is hoped to result in increased visibility for the community as a viable and desirable location for businesses and residents to grow and thrive. Additionally, the ability to fund the alignment has been a major consideration. A tunnel profile in the Rainier Valley would cost $400 million more than an at-grade profile.

In summary, governmental decision-makers felt that the Sound Transit project will substantially benefit the minority residents living within the Rainier Valley. After light rail service commences, for example:

- Rainier Valley residents' access to educational institutions will double and their access to health care facilities will increase by 24 percent.
- The Rainier Valley will have more new stations serving the community than any other area in the system.
- Rainier Valley residents will have nearly 200,000 more jobs accessible by transit within a one hour ride as compared to today.
- Transit access and travel-time savings will be increased for the Rainier Valley community to a greater degree than for any other part of the system. Currently, the per capita rate at which Rainier Valley residents ride the bus is one of the highest rates of any neighborhood in the region; 20 percent of Valley residents do not have access to a car. Once light rail service begins, the average transit travel-time savings for residents in Rainier Valley will be 18 minutes, a 31 percent improvement over today.
- Streetscape improvements along the route will enhance pedestrian connections to light rail stations, the Columbia City business district, and the Rainier Beach community.
- A $50 million Transit-Oriented Community Development Fund will be provided for the Rainier Valley in order to mitigate any impacts of project implementation and operation.

But as noted above, these benefits necessarily come with associated impacts from providing light rail service. Save Our Valley has alleged that these inevitable impacts, such as displacements, noise, and traffic safety, are disparate and give rise to a Title VI claim.

A way to avoid alleged disparities in, e.g., displacements would be to attempt to strike some absurd numerical equilibrium between minority and non-minority displacements. Thus, Sound

Transit would have to construct an alignment through the Valley that is designed to wend its way through the community and twist and curve in an effort to displace as many non-minority residential units as minority units, or to deliberately displace more non-minority persons in other parts of the system to "balance out" the number of overall displacements. Thus, rather than balancing competing interests and deciding the location and design of the alignment based on legitimate public transportation policy objectives, the application of Title VI § 602 would cause these decisions to be driven by conscious racial gerrymandering considerations of the worst kind.

Of course, the simplest solution would be to relocate the route to another area and not to serve the Rainier Valley at all. Clearly, Title VI was never intended to cause governments affirmatively to consider race as the predominate factor in designing transportation projects, and worse, to design such projects to avoid, at all cost, any impacts to minorities in order to ensure that Title VI is not violated. Yet that is precisely the consequence of adopting a broad private right of action under Title VI § 602.

The absurdity of applying Title VI § 602 to situations such a

Sound Transit's is amplified by the difficulty in attempting to craft a remedy. What would be the appropriate remedy? To halt the project and prevent the citizens of the Puget Sound region from benefiting from an essential component of the most expansive and integrated transportation system the region has ever known? To prevent the construction of an alignment through the Rainier Valley and thereby prevent the citizens of the Valley from being served as an equal partner in this tri-county system? Or to spend an *additional* $400 million to construct a tunnel in the Rainier Valley rather than an at-grade profile, and thereby jeopardize the economic viability of the entire project?

Given the heterogeneity of locations, topography, environments, and demographic compositions, no transit project will ever impose each of its impacts in a precisely identical fashion on each racial group. Congress could not have intended to authorize federal agencies to refuse to fund projects unless the project impacts were equalized for each racial group. Such a rule would require that the minority and white population of each neighborhood served by the project be evenly distributed across the entire alignment. The reality

of urban life is that certain neighborhoods have significantly higher concentrations of minority populations than other neighborhoods. Consequently, a rule requiring equal distribution of each impact on minority and non-minority populations would make it impossible to fund projects such as Sound Transit's that serve areas with relatively high numbers of minority residents. As Seattle aptly illustrates, no American city has such ethnically diverse neighborhoods so as to permit the equal distribution of each project impact among different racial groups.

Title VI was not intended to require that federally funded programs impose identical and proportional burdens on different racial groups, or to remedy social factors that lead to non-identical burdens. As this Court noted in a similar context in regard to employment discrimination, "[a] Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is a racial imbalance. . . . To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'" Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989); see also

African American Legal Defense Fund, Inc. v. New York State Department of Education, 8 F. Supp. 2d 330, 338 ("[O]ne cannot look to Title VI's regulations for remedy for any alleged disparate impact of [a school funding formula based on student attendance]. . . . Here, the 'grantees' are the school districts, and clearly it is not their practices that have produced the absenteeism. Accordingly, Title VI's regulations support no action at law upon those factors.").

This important distinction – between prohibiting discrimination and assuring substantively identical treatment – has been aptly stated by the U.S. Court of Appeals for the Fourth Circuit. In a recent case addressing the potential application of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq., to federally funded transportation projects, the court noted:

> [T]he Association argues that the underlying purpose of the Fair Housing Act "is that similarly situated residents are entitled to the equal distribution of benefits," and therefore that "residents also must be entitled to the equal distribution of burdens." This proportional burden theory is an unmanageable proposition. Under the Association's standard, how is a multicultural society ever to locate a highway? Suppose a roadway runs by a neighborhood that is thirty-five percent Anglo, forty-five percent

Latino, and twenty percent African American. Does the predominant ethnic group have a disparate impact claim? What if thirty-five percent of a route runs proximate to a predominantly Asian American neighborhood and twenty-five percent next to a predominantly Hispanic American neighborhood? Will planners have to relocate the corridor to ensure that it affects each ethnicity proportionally? Simply to put the question is to demonstrate the absurdity of the result: a twisting, turning roadway that zigs and zags only to capture equally every ethnic subset of our population. Such a standard would lead to race-based decisionmaking of the worst sort. We do not think the drafters of the Fair Housing Act ever contemplated such a reading.

Jersey Heights Neighborhood Assoc. v. Glendening, 174 F.3d 180, 193-94 (4th Cir. 1999) (emphasis added). The Fourth Circuit's conclusion applies equally to Title VI. Yet allowing inherent statistical disparity that results from providing significant transportation services to a minority community to form the basis of Title VI § 602 claim has the same negative result.

II. ADMINSTRATIVE REMEDIES ARE SUFFICIENT TO ASSURE COMPLIANCE WITH TITLE VI § 602

The issue then is how to resolve issues when individuals claim that these projects are being implemented discriminatorily? The

current statutory language and agency regulations provide a mechanism for aggrieved individuals to file a complaint with agency's Office of Civil Rights. 42 U.S.C. 2000-d; CFR 49.21. These agencies are fully able to conduct through investigations and determine whether discrimination exists in the implementation of federally funded projects. Persons who feel aggrieved by a project have an ample administrative remedy.

In Sound Transit's case for example, Save Our Valley, in August 1999, filed a complaint the Department of Transportation and HUD alleging that the design of certain sections of the proposed light rail system had a disparate impact on minority individuals. The FTA's Office of Civil Rights conducted an extensive investigation, including dispatching a 6 person team of investigators to Seattle to investigate the complaint. The multi-disciplinary team included an attorney form the U.S. Justice Department, the FTA Director of the Office of Civil Rights, a Department of Transportation environmental justice policy analyst, the Regional Director of the FTA's Office of Civil Rights and two FTA investigators. This team conducted an extensive investigation, including interviews with the elected officials who made

the decisions, and agency staff form all of the technical disciplines involved. the FTA also interviewed the persons filing the complaint and citizens within the affected communities. Sound Transit was required to submit extensive factual information to the investigators evaluating every aspect of the decisions that were being challenged as discriminatory. The investigation was through and included persons with the expertise to evaluate whether the agency made appropriate and justifiable decisions based on the complex engineering, environmental, financial, and policy factors that lead to the agency's decisions.

This administrative process, however, was never concluded. Save Our Valley chose to withdraw its administrative complaint and instead seek court intervention. The claimed right of a private right of action under Title VI § 602 undermined the administrative remedy contemplated by Congress.

Federal agencies have the congressional mandate to work with local governments and communities to develop solutions in the event there are issues of discrimination. Equipped with funding power and with the technical expertise, federal agencies are in the best position to

resolve complex issues appropriately, not the courts.

CONCLUSION

Allowing a private right of action under Title VI § 602 invites abuse by persons who lose a legitimate policy debate about the efficacy of a project or about one of the myriad trade-offs that must be made in siting large public projects such as transportation systems. A private right of action will permit plaintiffs to find a single negative consequence of a project that impacts members of a protected group more than others and use it as a basis of a Title VI claim. Allowing private individuals to bring such suits without limitation may have the perverse effect of discouraging agencies from attempting to implement beneficial projects in minority communities. The simplest way for local governments to avoid such a claim is to avoid serving minority

communities. The very problem that Title VI was enacted to address – the lack of federal funding for minority communities – will result.

RESPECTFULLY SUBMITTED this 13th day of November, 2000.

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